# UNITED STATES REPORTS

## VOLUME 468

---

CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1983

JUNE 27 THROUGH SEPTEMBER 19, 1984

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

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HENRY C. LIND

REPORTER OF DECISIONS

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UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1987

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For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

KF
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.U53
No. 468

## ERRATA

455 U. S. XLI, line 35: "923" should be "934".
465 U. S. 674, line 22: "instument" should be "instrument".

GL Stacks
Depos USA
5-14-87

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

## OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

# SUPREME COURT OF THE UNITED STATES

## ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

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Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

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(For next previous allotment, see 423 U. S., p. VI.)

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

# OCTOBER TERM, 1983

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## REED ET AL. *v.* ROSS

### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-218. Argued March 27, 1984—Decided June 27, 1984

In 1969, respondent was convicted of first-degree murder in a North Carolina state court and sentenced to life imprisonment. At trial, he had claimed lack of malice and self-defense, and, in accordance with well-settled North Carolina law, the trial judge instructed the jury that respondent had the burden of proving each of these defenses. Although respondent appealed his conviction on several grounds, he did not challenge the constitutionality of this instruction. In 1975, *Mullaney* v. *Wilbur*, 421 U. S. 684, struck down, as violative of due process, the requirement that the defendant bear the burden of proving lack of malice. In 1977, *Hankerson* v. *North Carolina*, 432 U. S. 233, held that *Mullaney* was to have retroactive application. Subsequently, after exhausting his state remedies, respondent brought a habeas corpus proceeding in Federal District Court under 28 U. S. C. § 2254, challenging the jury instruction, but the court held that habeas relief was barred because respondent had failed to raise the issue on appeal as required by North Carolina law. The Court of Appeals summarily affirmed, but this Court vacated and remanded for further consideration in light of *Engle* v. *Isaac*, 456 U. S. 107, and *United States* v. *Frady*, 456 U. S. 152, both of which addressed the standard for procedural bars under § 2254 whereby a state prisoner may not obtain federal habeas corpus relief absent a showing of "cause and actual prejudice," when a procedural default bars litigation of a constitutional claim in state court. On remand, the Court of Appeals reversed, holding that respondent had satisfied the "cause" requirement because the *Mullaney* issue was so novel at the time of his state appeal that his attorney could not reasonably be expected to have raised it. And the State conceded the existence of "prejudice."

*Held:* Respondent had "cause" for failing to raise the *Mullaney* issue on appeal from his conviction. Pp. 9–20.

(a) Where, as in this case, a defendant has failed to abide by a State's procedural rule requiring the exercise of legal expertise and judgment, the competing concerns implicated by the exercise of a federal court's habeas corpus power—on the one hand, Congress' interest in providing a federal forum for the vindication of state prisoners' constitutional rights and, on the other hand, the State's interest in the integrity of its rules and proceedings and the finality of its judgment—have come to be embodied in the "cause and prejudice" requirement. Pp. 9–11.

(b) Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. Pp. 12–16.

(c) Here, the *Mullaney* issue was sufficiently novel at the time of respondent's appeal to excuse his attorney's failure to raise it at that time. The state of the law at the time of the appeal did not offer a "reasonable basis" upon which to challenge the jury instruction in question. Pp. 16–20.

704 F. 2d 705, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 20. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 21.

*Richard N. League*, Special Deputy Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was *Rufus L. Edmisten*, Attorney General.

*Edwin Kneedler* argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, John H. Garvey,* and *Louis M. Fischer.*

*Barry Nakell*, by appointment of the Court, 464 U. S. 1036, argued the cause and filed a brief for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

In March 1969, respondent Daniel Ross was convicted of first-degree murder in North Carolina and sentenced to life imprisonment. At trial, Ross had claimed lack of malice and self-defense. In accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross, the defendant, had the burden of proving each of these defenses. Six years later, this Court decided *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), which struck down, as violative of due process, the requirement that the defendant bear the burden of proving lack of malice. *Id.*, at 704. Two years later, *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), held that *Mullaney* was to have retroactive application. The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise on appeal the unconstitutionality of the jury instruction on the burden of proof.

## I

### A

In 1970, this Court decided *In re Winship*, 397 U. S. 358, the first case in which we directly addressed the constitutional foundation of the requirement that criminal guilt be established beyond a reasonable doubt. That case held that "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, . . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364.

Five years after *Winship*, the Court applied the principle to the related question of allocating burdens of proof in a criminal case. *Mullaney* v. *Wilbur*, *supra*. *Mullaney* arose in the context of a Maine statute providing that "[w]hoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." *Id.*, at 686, n. 3. The trial judge had instructed the jury under this statute that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation."[1] *Id.*, at 686. Thus, despite the fact that malice was an element of the offense of murder, the law of Maine provided that, if the defendant contended that he acted without malice, but rather "in the heat of passion on sudden provocation," he, not the prosecution, was required to bear the burden of persuasion by a "fair preponderance of the evidence." *Ibid.* Noting that "[t]he result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction," *id.*, at 701, *Mullaney* held that due process requires the prosecution to bear the burden of persuasion with respect to each element of a crime.

Finally, *Hankerson* v. *North Carolina, supra,* held that *Mullaney* was to have retroactive application. In reaching this conclusion, the Court followed *Ivan V.* v. *City of New York*, 407 U. S. 203 (1972), which had held that *Winship* was retroactively applicable. Quoting *Ivan V.* and *Winship*, the Court stated:

> "'The [reasonable-doubt] standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law". . . . "Due process commands that no

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[1] As the Court in *Mullaney* explained, the trial court "emphasized that 'malice aforethought and heat of passion on sudden provocation are two inconsistent things' . . . ; thus by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter." 421 U. S., at 686–687.

> man shall lose his liberty unless the Government has borne its burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."'" *Hankerson, supra,* at 241 (quoting *Ivan V., supra,* at 204–205 (quoting *Winship, supra,* at 363–364)).

*Hankerson* further stated that, regardless of the administrative costs involved in the retroactive application of a new constitutional doctrine, "'[w]here the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect.'" 432 U. S., at 243 (quoting *Ivan V., supra,* at 204) (emphasis in original). In this case, we are called upon again, in effect, to revisit our decision in *Hankerson* with respect to a particular set of administrative costs—namely, the costs imposed on state courts by the federal courts' exercise of their habeas corpus jurisdiction under 28 U. S. C. § 2254.[2]

### B

Ross was tried for murder under the same North Carolina burden-of-proof law that gave rise to Hankerson's claim in *Hankerson* v. *North Carolina.*[3] That law, followed in

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[2] Title 28 U. S. C. § 2254 provides in pertinent part:

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

[3] Hankerson was convicted of second-degree murder. North Carolina law at the time of Hankerson's trial had provided that unlawfulness was an element of the crime of second-degree murder and that self-defense

North Carolina for over 100 years, was summarized by the North Carolina Supreme Court in *State* v. *Hankerson*, 288 N. C. 632, 647, 220 S. E. 2d 575, 586 (1975), as follows:

> "[W]hen it is established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If the defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter."

In accordance with this well-settled state law, the jury at Ross' trial was instructed as follows:

> "[I]n a case where a person is killed as a result of a gun shot wound fired intentionally . . . where the State has satisfied you beyond a reasonable doubt that the defendant intentionally assaulted the deceased with a deadly weapon and that such assault caused her death there are two presumptions that arise in favor of the State: One,

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negated unlawfulness. See *Hankerson* v. *North Carolina*, 432 U. S., at 238. The jury had been instructed as follows:

" 'If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed [the victim] with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. . . .

" '[I]n order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to *your satisfaction* that he acted in self-defense.' " *Id.*, at 236–237.

> that the killing was unlawful; two, that it was done with malice; and the burden then shifts to the defendant under those circumstances to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but to satisfy the jury that the killing was not done with malice if he would acquit himself of a charge of murder in the second degree, that is if he would expect and ask at your hands a verdict of less than guilty of murder in the second degree the burden would be upon him under the circumstances to satisfy the jury that the killing was not done with malice and if he would exonerate himself and show that the killing was not unlawful then the burden is upon him to satisfy the jury . . . that the killing was done . . . for some reason recognized by law as justifiable; and he relies here on self-defense." App. 23–24 (emphasis deleted).

On the basis of these instructions, Ross was convicted of first-degree murder. Although Ross appealed his conviction to the North Carolina Supreme Court on a number of grounds, *In re Burrus*, 275 N. C. 517, 169 S. E. 2d 879 (1969), he did not challenge the constitutionality of these instructions—we may confidently assume this was because they were sanctioned by a century of North Carolina law and because *Mullaney* was yet six years away.[4]

Ross challenged the jury instructions for the first time in 1977, shortly after this Court decided *Hankerson*. He initially did so in a petition filed in state court for postconviction relief, where his challenge was summarily rejected at both the trial and appellate levels. See App. to Brief for Petitioners A3–A8. After exhausting his state remedies, Ross brought the instant federal habeas proceeding in the United States District Court for the Eastern District of North

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[4] In addition, Ross did not contemporaneously object to the jury instructions. But under North Carolina law at the time, a contemporaneous objection at trial was not necessary to preserve for review a question involving jury instructions. *State* v. *Gause*, 227 N. C. 26, 40 S. E. 2d 463 (1946).

Carolina under 28 U. S. C. § 2254. The District Court, however, held that habeas relief was barred because Ross had failed to raise the issue on appeal as required by North Carolina law,[5] App. 27, and the Court of Appeals for the Fourth Circuit dismissed Ross' appeal summarily. 660 F. 2d 492 (1982). On Ross' first petition for certiorari, however, this Court vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of *Engle* v. *Isaac*, 456 U. S. 107 (1982), and *United States* v. *Frady*, 456 U. S. 152 (1982), two cases in which we addressed the "cause and prejudice" standard for procedural bars under § 2254. 456 U. S. 921 (1982). On remand, the Court of Appeals reversed, holding that Ross' claim met the "cause and prejudice" requirements and that the District Court had therefore erred in denying his petition for a writ of habeas corpus. 704 F. 2d 705 (1983). The Court of Appeals found the "cause" requirement satisfied because the *Mullaney* issue was so novel at the time of Ross' appeal that Ross' attorney could not reasonably be expected to have raised it. 704 F. 2d, at 708–709. And the State had conceded the existence of "prejudice" in light of evidence that had been introduced to indicate that Ross might have acted reflexively in self-defense. The Court of Appeals went on to hold that the jury instruction concerning the burden of proof for both malice and self-defense violated *Mullaney*. 704 F. 2d, at 709.[6] We granted certiorari, 464 U. S. 1007 (1983), to determine whether the Court of Appeals erred in concluding that Ross had "cause" for failing to raise the *Mullaney* question on appeal. We now affirm.

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[5] Under North Carolina law, exceptions to jury instructions must be made after trial if they are to be preserved for appellate review, and errors that could have been raised on appeal may not be raised for the first time in postconviction proceedings. *State* v. *Abernathy*, 36 N. C. App. 527, 244 S. E. 2d 696 (1978); *State* v. *White*, 274 N. C. 220, 162 S. E. 2d 473 (1968). See 704 F. 2d 705 (CA4 1983); *Cole* v. *Stevenson*, 620 F. 2d 1055, 1057–1059 (CA4 1980).

Respondent argues that the North Carolina procedural bar is inapplicable in this case because the North Carolina Supreme Court considered the merits of his *Mullaney* claim both on appeal and on postconviction review, despite his procedural default. *Engle* v. *Isaac*, 456 U. S. 107, 135, n. 44 (1982). See Brief for Respondent 2–5. With respect to the former, respondent bases his argument on the fact that the North Carolina Supreme Court stated generally that it had "examined the [jury] charge and conclude[d that] it is in accordance with legal requirements and is unobjectionable." *State* v. *Ross*, 275 N. C. 550, 554, 169 S. E. 2d 875, 878 (1969). With respect to postconviction review, respondent argues that the failure of the North Carolina courts to rely explicitly on procedural grounds in summarily dismissing his petition indicates that they considered the merits of his constitutional claim. See App. to Brief for Petitioners A5, A8. Although the Court of Appeals stated that "[t]he claim of waiver is not without some support," 704 F. 2d, at 707, it did not reach the question. Similarly, in light of our disposition of this case on the basis of respondent's primary argument, we need not address the question.

In addition, respondent argues that the District Court erred in imposing a forfeiture, both because the North Carolina courts have been inconsistent in imposing the State's procedural bar for the failure to raise the burden-of-proof issue before *Mullaney* and because North Carolina law does not require a forfeiture for every procedural default. Brief for Respondent 5–10, 41. We also need not address this issue.

## II

### A

Our decisions have uniformly acknowledged that federal courts are empowered under 28 U. S. C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated. See, *e. g.*, *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Fay* v. *Noia*, 372 U. S. 391, 398–399 (1963). See generally W. Duker, A Constitutional History of Habeas Corpus 181–211 (1980). The more difficult question, and the one that lies at the heart of this case is: What standards should govern the exercise of the habeas court's equitable discretion in the use of this power?

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[6] The State complied with the decision of the Court of Appeals by releasing Ross, who, at that time, was on work-release in a custody status that allowed weekend home leaves.

A habeas court's decision whether to review the merits of a state prisoner's constitutional claim, when the prisoner has failed to follow applicable state procedural rules in raising the claim, implicates two sets of competing concerns. On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners. There can be no doubt that in enacting § 2254, Congress sought to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972).

On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in state court. The criminal justice system in each of the 50 States is structured both to determine the guilt or innocence of defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading up to the verdict. Each State's complement of procedural rules facilitates this complex process, channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.

North Carolina's rule requiring a defendant initially to raise a legal issue on appeal, rather than on postconviction review, performs such a function. It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not properly raised before the state court, these legitimate state interests may be frustrated: evidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long after his trial; and it may be too late to retry the defendant effectively if he prevails in his collateral challenge. Thus, we have long recognized that "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Francis* v. *Henderson*, *supra*, at 539. See also *Fay* v. *Noia*, *supra*, at 425–426.

Where, as in this case, a defendant has failed to abide by a State's procedural rule requiring the exercise of legal expertise and judgment, the competing concerns implicated by the exercise of the federal court's habeas corpus power have come to be embodied in the "cause and prejudice" requirement: When a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of "cause and actual prejudice." *Engle* v. *Isaac*, 456 U. S., at 129; *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). See *id.*, at 91–94 (BURGER, C. J., concurring); *id.*, at 94–95 (STEVENS, J., concurring). Cf. *id.*, at 98–99 (WHITE, J., concurring in judgment).[7] We therefore turn to the question whether the cause-and-prejudice test was met in this case.

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[7] See, *e. g.*, *Crick* v. *Smith*, 650 F. 2d 860, 867–868 (CA6 1981); *Graham* v. *Mabry*, 645 F. 2d 603, 606–607 (CA8 1981); *Boyer* v. *Patton*, 579 F. 2d 284, 286 (CA3 1978). See also Comment, Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims, 130 U. Pa. L. Rev. 981, 988–989 (1982).

The situation of a defendant representing himself, see *Faretta* v. *California*, 422 U. S. 806 (1975), is not presented in this case and we express no view on the applicability of the cause-and-prejudice requirement in that context.

## B

As stated above, petitioners have conceded that Ross suffered "actual prejudice" as a result of the trial court's instruction imposing on him the burden of proving self-defense or lack of malice. 704 F. 2d, at 707. At trial, Ross testified that he had been stabbed in the neck immediately prior to the shooting for which he was convicted and that when he felt the stab wound he "turned around shooting." App. 18. In corroboration of this testimony, another witness stated that Ross was bleeding from the neck when Ross left the scene of the shooting. Therefore, were it not for the fact that Ross was required to bear the burden of proving lack of malice and self-defense, he might not have been convicted of first-degree murder. Thus the only question for decision is whether there was "cause" for Ross' failure to raise the *Mullaney* issue on appeal.[8]

The Court of Appeals held that there was cause for Ross' failure to raise the *Mullaney* issue on appeal because of the

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[8] The term "cause" was first employed in this context in *Davis* v. *United States*, 411 U. S. 233 (1973). The petitioner in that case had been convicted in federal court. It was not until he filed a petition for postconviction relief under 28 U. S. C. § 2255 that he challenged the racial composition of the grand jury that had indicted him. Thus he had failed to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure, which required that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that the failure to present such defenses or objections "constitutes a waiver thereof, but the court for *cause shown* may grant relief from the waiver" (emphasis added). See 411 U. S., at 236. In *Davis*, the Court held that the "cause shown" requirement of Rule 12(b)(2) applies to claims brought under § 2255 where the petitioner has failed to raise the claim in accordance with the Rule. In *Francis* v. *Henderson*, 425 U. S. 536 (1976), the same question arose in the context of an action brought by a state prisoner under § 2254. The Court held that, although the State in which the petitioner had been convicted had no "cause shown" provision in its rule requiring timely challenges to indictments, the rule of *Davis* v. *United States* should apply nonetheless.

"novelty" of the issue at the time.[9] As the Court of Appeals characterized the legal basis for raising the *Mullaney* issue at the time of Ross' appeal, there was merely "[a] hint here and there voiced in other contexts," which did not "offe[r] a reasonable basis for a challenge to frequently approved jury instructions which had been used in North Carolina, and many other states, for over a century." 704 F. 2d, at 708.

*Engle* v. *Isaac*, *supra*, left open the question whether the novelty of a constitutional issue at the time of a state-court proceeding could, as a general matter, give rise to cause for defense counsel's failure to raise the issue in accordance with applicable state procedures. *Id.*, at 131. Today, we answer that question in the affirmative.

Because of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term "cause" precise content. See *Wainwright* v. *Sykes*, *supra*, at 87. Nor do we attempt to do so here. Underlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, *Wainwright* v. *Sykes*, *supra*, at 91, and n. 14; *Henry* v. *Mississippi*, 379 U. S. 443, 451 (1965), and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct, *Wainwright* v. *Sykes*, *supra*, at 89–90; *Engle* v. *Isaac*, *supra*, at 130. A defense attorney, therefore, may not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in federal court. *Wainwright* v. *Sykes*, *supra*, at 89; *Engle* v. *Isaac*, *supra*, at 128–129. Similarly, he may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court. *Wainwright* v. *Sykes*, 433 U. S., at 96–97 (STEVENS, J., concurring); *id.*, at 98–99 (WHITE, J., concurring in judgment). In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would also undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, "inexcusable," *Estelle* v. *Williams*, 425 U. S. 501, 513 (1976) (POWELL, J., concurring), and cannot qualify as "cause" for purposes of federal habeas corpus review.

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[9] Other Courts of Appeals have held that novelty can constitute cause. See, *e. g.*, *Norris* v. *United States*, 687 F. 2d 899, 903 (CA7 1982); *Dietz* v. *Solem*, 677 F. 2d 672, 675 (CA8 1982); *Collins* v. *Auger*, 577 F. 2d 1107, 1110, and n. 2 (CA8 1978); *Myers* v. *Washington*, 702 F. 2d 766, 768 (CA9 1983); *Gibson* v. *Spalding*, 665 F. 2d 863, 866 (CA9 1981); *Ford* v. *Strickland*, 696 F. 2d 804, 817 (CA11 1983); *Sullivan* v. *Wainwright*, 695 F. 2d 1306, 1311 (CA11 1983). See generally Comment, Habeas Corpus—The Supreme Court Defines The *Wainwright* v. *Sykes* "Cause" and "Prejudice" Standard, 19 Wake Forest L. Rev. 441, 454–456 (1983).

On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.[10] If counsel has no reasonable basis upon which to formulate a constitutional question, setting aside for the moment exactly what is meant by "reasonable basis," see *infra*, at 16–18, it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.

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[10] Several commentators have urged this and related positions. See, *e. g.*, Goodman & Sallet, *Wainwright* v. *Sykes:* The Lower Federal Courts Respond, 30 Hastings L. Rev. 1683, 1712 (1979); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 153–154 (1970); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 460 (1963); Comment, *supra* n. 7, at 1012–1013.

Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance, as the *Mullaney* issue currently does, when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose. Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand. Raising such a claim in state court, therefore, would not promote either the fairness or the efficiency of the state criminal justice system. It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition.[11] Particularly disturbed by this prospect, Judge Haynsworth, writing for the Court of Appeals in this case, stated:

> "If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable." 704 F. 2d, at 708.

Accordingly, we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. We therefore turn to the question whether the *Mullaney* issue, which respondent Ross has raised in this action, was sufficiently novel at the time of the appeal from his conviction to excuse his attorney's failure to raise it at that time.

### C

As stated above, the Court of Appeals found that the state of the law at the time of Ross' appeal did not offer a "reasonable basis" upon which to challenge the jury instructions on the burden of proof. 704 F. 2d, at 708. We agree and therefore conclude that Ross had cause for failing to raise the issue at that time. Although the question whether an attorney has a "reasonable basis" upon which to develop a legal theory may arise in a variety of contexts, we confine our attention to the specific situation presented here: one in which this Court has articulated a constitutional principle that had not been previously recognized but which is held to have retroactive application. In *United States* v. *Johnson*, 457 U. S. 537 (1982), we identified three situations in which a "new" constitutional rule, representing "'a clear break with the past,'" might emerge from this Court. *Id.*, at 549 (quoting *Desist* v. *United States*, 394 U. S. 244, 258–259 (1969)). First, a decision of this Court may explicitly overrule one of our precedents. *United States* v. *Johnson*, 457 U. S., at 551. Second, a decision may "overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Ibid.* And, finally, a decision may "disapprov[e] a practice this Court arguably has sanctioned in prior cases." *Ibid.* By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement. Cases falling into the third category, however, present a more difficult question. Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.

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[11] For instance, in *Hurtado* v. *California*, 110 U. S. 516 (1884), this Court held that indictment by a grand jury is not essential to due process under the Fourteenth Amendment. Surely, we should not encourage criminal counsel in state court to argue the contrary in every possible case, even if there were a possibility that some day *Hurtado* may be overruled.

This case is covered by the third category. At the time of Ross' appeal, *Leland* v. *Oregon*, 343 U. S. 790 (1952), was the primary authority addressing the due process constraints upon the imposition of the burden of proof on a defendant in a criminal trial. In that case, the Court held that a State may require a defendant on trial for first-degree murder to bear the burden of proving insanity beyond a reasonable doubt, despite the fact that the presence of insanity might tend to imply the absence of the mental state required to support a conviction. See *id.*, at 806 (Frankfurter, J., dissenting). *Leland* thus confirmed "the long-accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant," *Patterson* v. *New York*, 432 U. S. 197, 211 (1977), and arguably sanctioned the practice by which a State crafts an affirmative defense to shift to the defendant the burden of disproving an essential element of a crime. As stated above, North Carolina had consistently engaged in this practice with respect to the defenses of lack of malice and self-defense for over a century. See *supra*, at 5–7. Indeed, it was not until five years after Ross' appeal that the issue first surfaced in the North Carolina courts, and even then it was rejected out of hand. *State* v. *Sparks*, 285 N. C. 631, 643–644, 207 S. E. 2d 712, 719 (1974). See also *State* v. *Wetmore*, 287 N. C. 344, 353–354, 215 S. E. 2d 51, 56–57 (1975); *State* v. *Harris*, 23 N. C. App. 77, 79, 208 S. E. 2d 266, 268 (1974).

Moreover, prior to Ross' appeal, only one Federal Court of Appeals had held that it was unconstitutional to require a defendant to disprove an essential element of a crime for which he is charged. *Stump* v. *Bennett*, 398 F. 2d 111 (CA8 1968). Even that case, however, involved the burden of proving an alibi, which the Court of Appeals described as the "den[ial of] the possibility of [the defendant's] having committed the crime by reason of being elsewhere." *Id.*, at 116. The court thus contrasted the alibi defense with "an affirmative defense [which] generally applies to justification for his admitted participation in the act itself," *ibid.*, and distinguished *Leland* on that basis, 398 F. 2d, at 119. In addition, at the time of Ross' appeal, the Superior Court of Connecticut had struck down, as violative of due process, a statute making it unlawful for an individual to possess burglary tools "without lawful excuse, the proof of which excuse shall be upon him." *State* v. *Nales*, 28 Conn. Supp. 28, 29, 248 A. 2d 242, 243 (1968). Because these cases provided only indirect support for Ross' claim, and because they were the only cases that would have supported Ross' claim at all, we cannot conclude that they provided a reasonable basis upon which Ross could have realistically appealed his conviction.

In *Engle* v. *Isaac*, 456 U. S. 107 (1982), this Court reached the opposite conclusion with respect to the failure of a group of defendants to raise the *Mullaney* issue in 1975. That case differs from this one, however, in two crucial respects. First, the procedural defaults at issue there occurred five years after we decided *Winship*, which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U. S., at 364. As the Court in *Engle* v. *Isaac* stated, *Winship* "laid the basis for [the habeas petitioners'] constitutional claim." 456 U. S., at 131. Second, during those five years, "numerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses" (footnotes omitted). See *id.*, at 132, n. 40 (citing cases). Moreover, as evidence of the reasonableness of the legal basis for raising the *Mullaney* issue in 1975, *Engle* v. *Isaac* emphasized that "dozens of defendants relied upon *[Winship]* to challenge the constitutionality of rules requiring them to bear a burden of proof." 456 U. S., at 131–132. None of these bases of decision relied upon in *Engle* v. *Isaac* is present in this case.

## III

We therefore conclude that Ross' claim was sufficiently novel in 1969 to excuse his attorney's failure to raise the *Mullaney* issue at that time. Accordingly, we affirm the decision of the Court of Appeals with respect to the question of "cause."[12]

*It is so ordered.*

JUSTICE POWELL, concurring.

I join the opinion and judgment of the Court. I write separately only to make clear that I continue to adhere to the views expressed in my concurring opinion in *Hankerson* v. *North Carolina*, 432 U. S. 233, 246–248 (1977).

In *Hankerson*, I agreed with the Court that the new constitutional rule announced in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), should apply retroactively to cases on direct review. In this case, the rule of *Mullaney* has been applied retroactively on collateral review. For the reasons stated by Justice Harlan in *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (separate opinion), I would apply new constitutional rules retroactively on collateral review only in exceptional cases. See *Hankerson*, *supra*, at 247–248 (POWELL, J., concurring). The State, however, has not challenged the retroactive application of *Mullaney* in this case. Thus, the issue whether that retroactive application is proper has not been presented to this Court.

Assuming, as we must, that *Mullaney* may be applied retroactively in this case, and for the reasons set forth in the Court's opinion today, I agree that Ross has shown "cause" for failing to raise his constitutional claim in a timely fashion.

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[12] Petitioners have not challenged the Court of Appeals' conclusion that the jury instructions were unconstitutional under *Mullaney*. We therefore do not reach the question.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

Today's decision will make less sense to laymen than it does to lawyers. Respondent Ross was convicted of first-degree murder in a North Carolina trial court in 1969. In 1977, eight years later, he instituted the present federal habeas action seeking to have his conviction set aside on the ground that an instruction given by the trial judge improperly placed upon him, rather than on the State, the burden of proving the defenses of "lack of malice" and "self-defense." Today, 15 years after the trial, the Court holds that Ross' conviction must be nullified on federal constitutional grounds. Responding to the State's contention that Ross never raised any objection to the instruction given by the trial judge, and that North Carolina law requires such an objection, the Court blandly states that no competent lawyer in 1969 could have expected that such an objection would have been sustained, because the law was to the contrary. Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.

Along its way to this troubling result, the Court reaffirms the importance of the principles of comity and orderly administration of justice that underlie our decisions in such cases as *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). It fully concedes the application of these principles on federal habeas review through the "cause and prejudice" standard adopted in *Wainwright* v. *Sykes*. *Ante*, at 11.[1] The Court's seemingly straightforward determination of "cause" in this instance also involves a labyrinthine treatment of our prior decisions that flouts both common sense and significantly bends our decisions in *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), and *Engle* v. *Isaac*, 456 U. S. 107 (1982).

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[1] Part of the Court's opinion suggests that it might be of two minds on this matter. It states that "the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests." *Ante*, at 14. As the Court's opinion makes clear, however, this formulation does not presage a return to the "knowing waiver" or "deliberate

The District Court in this case held that respondent failed to satisfy the "cause" standard of *Wainwright* v. *Sykes*, and thus, his claims were barred by the State's procedural default rule, which required him to at least raise the issue on direct appeal. Like the Court of Appeals, the Court proposes to adopt "novelty" as a possible form of "cause" under *Wainwright* v. *Sykes* to justify ignoring the State's procedural default rule. But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more "novel" a claimed constitutional right, the more unlikely a violation of that claimed right undercuts the fundamental fairness of the trial. To untie this knot in logic, the Court proposes a definition of novelty that makes a claim novel if the legal basis for asserting the claim is not reasonably available. *Ante*, at 15–16. This standard. of course, has no meaningful content independent of the factual setting in which it is applied. The Court's attempt to give content to this novelty standard, however, is simply too facile; under its application, virtually any new constitutional claim can be deemed "novel."

The starting point for the Court's evaluation of respondent's novelty claim should be our decision in *In re Winship*, 397 U. S. 358 (1970), which initiated a line of cases culminating, one would hope, in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). The Court in *Winship* held that the Due Process Clause of the Constitution required the State to prove the elements of a crime "beyond a reasonable doubt." But the only issue in *Winship* that was treated as novel was whether

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by-pass" rule of *Fay* v. *Noia*, 372 U. S. 391 (1963), which was squarely rejected by a majority of this Court in *Wainwright* v. *Sykes*, 433 U. S., at 87–88.

the same burden of proof requirements applied to juvenile trials. With respect to adults the Court treated this question as settled by a long line of earlier decisions, ranging in date of decision from *Miles* v. *United States*, 103 U. S. 304 (1881), to *Holland* v. *United States*, 348 U. S. 121 (1954). The Court stated:

> "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." 397 U. S., at 362.

In short, just a year after respondent's conviction, this Court regarded as well established the principle that in an adult trial the State was constitutionally required to bear the burden of proof as to "every fact necessary to constitute the crime . . . charged." *Id.*, at 364.

Our decision in *Winship* was held fully retroactive in *Ivan V.* v. *City of New York*, 407 U. S. 203 (1972). Three years later, in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), we held that it was contrary to our *Winship* decision to require a defendant in a murder prosecution to prove that he acted in the heat of passion or sudden provocation in order to reduce the offense to manslaughter. The Court held that the constitutional interests described in *Winship* were "implicated to a greater degree in this case than they were in *Winship* itself." 421 U. S., at 700.

The *Mullaney* decision was given retroactive effect in *Hankerson* v. *North Carolina*, *supra*. In reaching this decision, however, the Court dealt with the State's argument that retroactive application of *Mullaney* v. *Wilbur* would have a serious, adverse impact on the administration of justice in this country because of the number of potential retrials that might be required, by reaffirming the principles enunciated in *Ivan V.* and by stating:

> "Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the

> sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U. S., at 244, n. 8.

If North Carolina took any solace from this Court's explicit statement in *Hankerson* that North Carolina need not worry about having to retry murders so long as it applied a contemporaneous-objection rule, today's opinion shows that its reliance was quite unjustified. The Court today does a complete about-face from *Hankerson* and, without even mentioning the above-quoted language, holds that the state court may not bar the belated assertion of such a claim by application of a contemporaneous-objection rule. The Court goes on to conclude that the claim based upon the allocation of proof in the instructions was "novel" in 1969, because the leading case on point at that time was *Leland* v. *Oregon*, 343 U. S. 790 (1952), which held that the State might require a defendant to bear the burden of proving affirmative defenses. But the holding of *Leland* was reaffirmed in *Patterson* v. *New York*, 432 U. S. 197 (1977), indicating that our decision in *Leland* did not speak directly to the issues involved in *Mullaney* v. *Wilbur*. Further, far from being regarded as the "leading case" on the subject in 1969, *Leland* v. *Oregon* was only mentioned as one of a number of cases in a string citation for the general proposition approved in *Winship*. 397 U. S., at 362.

Finally, the Court asserts no convincing basis for distinguishing respondent's claims from those rejected in our decision in *Engle* v. *Isaac*, 456 U. S. 107 (1982). In *Engle* v. *Isaac* we determined that claims similar to respondent's hardly qualified as novel, their assertion coming at least four and one-half years after *Winship*. Though we stated that *Winship* laid the basis for the claims asserted in *Engle* v. *Isaac*, we also expressly stated that the legal basis on which *Winship* rested was perceived earlier by other courts. 456 U. S., at 131, n. 39. The Court now distinguishes those other cases essentially on their facts, while never coming to grips with the fact that the reasoning employed in *State* v. *Nales*, 28 Conn. Supp. 28, 248 A. 2d 242 (1968), and *Stump* v. *Bennett*, 398 F. 2d 111 (CA8 1968), formed the framework for respondent's claims asserted here.[2]

We are reduced by this bizarre line of reasoning to the following conclusions: *Winship*, decided in 1970, simply reaffirmed a long line of existing cases when it held that the burden of proof as to the elements of the crime must be borne by the State "beyond a reasonable doubt"; and *Mullaney* v. *Wilbur*, decided in 1975, considered this principle even more applicable to instructions on elements of the crime in a murder trial than was true of the finding of delinquency in *Winship*. In other words, *Mullaney* was an *a fortiori* case from *Winship*, and *Winship* announced a principle which had been settled many years ago by decisions of this Court.[3]

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[2] For instance, the Court's treatment of the decision in *Stump* v. *Bennett* wholly ignores the following language:

"Whether or not one interprets the treatment of *Davis* in *Leland* as denying a constitutional status to the 'presumption of innocence,' this much is clear: when the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, as it was in the instant case, then it is certain that the due process clause of the Fourteenth Amendment has been violated." 398 F. 2d, at 118.

I cannot imagine a clearer basis than *Stump* for asserting the claim upon which respondent ultimately prevailed in the Fourth Circuit.

*Stump* was decided on June 27, 1968; by November 13, 1968, the Connecticut court in *State* v. *Nales* relied upon *Stump* to strike down the conviction in that case. 28 Conn. Supp., at 31, 248 A. 2d, at 244. Respondent's conviction came in March of the following year, which certainly is enough time to find that the legal basis for making his claim was reasonably available to him.

But, it seems, lawyers are not required to reason in quite the same manner as judges do. A lawyer in North Carolina, one year before *Winship* announced that the constitutional requirement of proof beyond a reasonable doubt had been long settled in the law, had no "reasonable basis" upon which to challenge the jury instructions given by the North Carolina trial court in this case. Either one or the other of these modes of reasoning, it seems to me, must be wrong.

I would conclude that there was an adequate basis for raising an objection in this case, and that the State's interests in the finality of its judgments require an attorney to raise an objection when an instruction violates a constitutional requirement of the allocation of burden of proof which this Court held one year later had been long settled. I would reverse the judgment of the Court of Appeals.

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[3] The Court justifies its decision in part on the ground that federal courts, sitting on habeas review, stand as the last guardians of individual rights against state oppression. *Ante*, at 10. As protectors of individual liberties, however, the federal judiciary must take into consideration the systemic effects of its habeas review powers. The orderly administration of justice and concerns of finality not only have significance for the allocation of social resources in the area of criminal justice, but also affect the distribution of those resources so allocated, and ultimately, what justice remains to be dispensed by courts. The time and energy spent relitigating trials long final and completely fair when first conducted takes resources away from others demanding attention from the criminal justice system. The Court's treatment of novelty as cause suggests that whenever the Court announces a new principle of constitutional law to be applied retroactively, a State's procedural default rule will have no effect. Far preferable, it seems to me, would be the adoption of the position of Justice Harlan, that new constitutional principles should, with rare exception, not be given retroactive application on habeas review. See *Mackey* v. *United States*, 401 U. S. 667, 688–689 (1971).

# THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* ROBERTS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–1330. Argued April 23, 1984—Decided June 27, 1984

Following an accident in which he lost control of his car and collided with a pickup truck, killing a passenger in the truck, respondent was charged with four misdemeanors—reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated. Upon being convicted of these charges in a Mississippi Justice of the Peace Court, he appealed, and the case was transferred to the Circuit Court for a trial *de novo*. While the appeal was pending, he was indicted for manslaughter based on the same accident, and was convicted. The Mississippi Supreme Court affirmed, refusing respondent leave to pursue state postconviction remedies. Respondent then brought a habeas corpus action in Federal District Court, which adopted a Magistrate's report holding that the manslaughter prosecution violated the Double Jeopardy Clause and that substitution of a felony charge covering the conduct for which respondent had been convicted of the misdemeanors violated the Due Process Clause. The Court of Appeals affirmed, relying solely on the double jeopardy ground.

*Held:*

1. The prosecution of respondent for manslaughter, following his invocation of his statutory right to appeal his misdemeanor convictions, was unconstitutional as a violation of due process. *Blackledge* v. *Perry*, 417 U. S. 21. The fact that the proceedings before the Justice of the Peace were the county prosecutor's responsibility, whereas the felony indictment was obtained by the District Attorney, who was then involved in the manslaughter trial, may not make inappropriate the presumption of unconstitutional vindictiveness arising from obtaining that indictment. That presumption does not hinge on the continued involvement of a particular individual. In any event, here the county prosecutor was the State's sole representative at the arraignment on the felony indictment and, as required by statute, assisted at the manslaughter trial. Pp. 30–32.

2. Although the Court of Appeals and the petition for certiorari addressed only the double jeopardy issue, this Court, without deciding that issue, will decide the due process issue and not remand it to the Court of Appeals, where it was argued in both courts below, the State's opposi-

tion to the Magistrate's report and its brief to the Court of Appeals are before this Court, and the factual record is adequate. Pp. 32–33.

693 F. 2d 132, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 33. O'CONNOR, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 40.

*William S. Boyd III*, Special Assistant Attorney General of Mississippi, argued the cause for petitioners. With him on the briefs were *Edwin Lloyd Pittman*, Attorney General, and *Bill Allain*, former Attorney General.

*Rhesa H. Barksdale*, by invitation of the Court, 464 U. S. 1006, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief was *Luther T. Munford*. A brief for respondent was also filed.*

JUSTICE WHITE delivered the opinion of the Court.

On August 6, 1977, respondent Barry Joe Roberts lost control of his car and collided with a pickup truck, killing a passenger in the truck. Shortly after the accident, Roberts received citations for reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated. He was convicted of these four misdemeanors in a Justice of the Peace Court in Tallahatchie County, Miss.[1] Roberts gave notice of appeal and the case was transferred to the Circuit Court for trial *de novo*.[2]

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**Edwin L. Miller, Jr.*, *Jack E. Yelverton*, *James P. Manak*, *Newman A. Flanagan*, and *Michael C. Moore* filed a brief for the National District Attorneys Association, Inc., et al. as *amici curiae* urging reversal.

[1] Roberts was fined $100 for reckless driving, fined $100 and sentenced to 6 months in jail for driving while his license was revoked, fined $100 and sentenced to 10 days in jail for driving on the wrong side of the road, and fined $1,000 and sentenced to 11 months in jail for driving under the influence.

[2] Under the Mississippi scheme then in effect, Justice of the Peace Courts had concurrent jurisdiction with the County Courts over misdemeanors. Miss. Code Ann. §§ 9–9–21, 99–33–1 (1972). In practice,

While the appeal was pending, in December 1977, a grand jury indicted Roberts for manslaughter based on the August 6 accident. App. 90–91. Roberts was arraigned on the appeal and the felony indictment simultaneously, and the five charges were set for trial together. *Id.*, at 92–93. During the trial, the State elected not to press the misdemeanor charges and remanded them to the file.[3] The jury convicted Roberts of manslaughter, and the judge sentenced him to 20 years in prison. The Mississippi Supreme Court affirmed. *Roberts* v. *State*, 379 So. 2d 514 (1979). It also refused Roberts leave to pursue state postconviction remedies.

Roberts then brought the present habeas corpus action in the United States District Court for the Northern District of Mississippi. The petition was referred to a Magistrate, who recommended that the writ issue for two reasons. First, the manslaughter prosecution violated the Double Jeopardy Clause because proof of manslaughter required proof of all the elements of reckless driving, of which Roberts had already been convicted. See *Illinois* v. *Vitale*, 447 U. S. 410 (1980). Second, substitution of a felony charge covering the conduct for which Roberts had already been convicted of four misdemeanors violated the Due Process Clause. See *Blackledge* v. *Perry*, 417 U. S. 21 (1974). The District Court adopted the Magistrate's report. The Court of Appeals for the Fifth Circuit affirmed, relying solely on the double jeopardy argument, judgment order reported at 693 F. 2d 132 (1982).

We granted certiorari, 461 U. S. 956 (1983), and we now affirm. Although the court below and the petition for certio-

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misdemeanors were always brought in one or the other of these courts by county prosecutors. Brief for Petitioners 5, n. 1; Tr. of Oral Arg. 7–10. Such proceedings were initiated by affidavit, the traffic citations serving that function in the present case. If convicted in the Justice of the Peace Court, the defendant had an absolute right to appeal to the Circuit Court for a trial *de novo*. § 99–35–1.

[3] Under Mississippi practice, a remand to the file "is the functional equivalent of a *nolle pros*." Tr. of Oral Arg. 15.

rari addressed only the double jeopardy issue, we may affirm on any ground that the law and the record permit and that will not expand the relief granted below. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977). Because this case is plainly controlled by *Blackledge* v. *Perry*, *supra*, we affirm on the basis of that decision without reaching the double jeopardy issue.

Perry was convicted of assault in a court of limited jurisdiction under a scheme essentially identical to Mississippi's. He exercised his statutory right to a trial *de novo*, and the prosecutor then obtained a felony indictment charging him with assault with a deadly weapon. We concluded that this sequence of events suggested "a realistic likelihood of 'vindictiveness.'" 417 U. S., at 27. Fearing that the prosecutor, who "has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo*," would make retaliatory use of his power to "up the ante," we considered the situation analogous to the imposition of a stiffer sentence after reversal and reconviction. See *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). We therefore established a presumption of unconstitutional vindictiveness in these circumstances. *Blackledge*, *supra*, at 27–28.

*Blackledge* clearly controls this case.[4] The relevant facts are identical. Like Perry, Roberts was convicted of a misdemeanor and exercised his right to a trial *de novo*, only to be confronted with a felony charge. That charge covered the same conduct as the misdemeanors he sought to appeal. As the Magistrate concluded, "[t]he facts of this case fall squarely within *Blackledge.*" App. to Pet. for Cert. A4.

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[4] At oral argument, the State suggested that *Blackledge* had been overruled, or at least modified, by *United States* v. *Goodwin*, 457 U. S. 368 (1982). Tr. of Oral Arg. 24. *Goodwin* held that the *Blackledge* presumption does not apply when charges are enhanced following a pretrial demand for a jury trial. We distinguished *Blackledge* on the basis of the critical differences in the timing of the heightened charge and in the amount of extra effort to which the defendant has put the State. There is no hint in *Goodwin* that *Blackledge* does not apply with full force in the circumstances of that case, circumstances that are repeated here.

The only possible distinction between the two cases is that in *Blackledge* the same attorney was apparently responsible for the entire prosecution. Here the proceedings before the Justice of the Peace were the responsibility of the county prosecutor, whereas the felony indictment was obtained by the District Attorney, who was then involved in the manslaughter trial. It might be argued that if two different prosecutors are involved, a presumption of vindictiveness, which arises in part from assumptions about the individual's personal stake in the proceedings, is inappropriate. Cf. *Colten* v. *Kentucky*, 407 U. S. 104 (1972) (refusing to apply prophylactic rule of *Pearce* where enhanced sentence is imposed by a different court after trial *de novo*). On the other hand, to the extent the presumption reflects "institutional pressure that . . . might . . . subconsciously motivate a vindictive prosecutorial . . . response to a defendant's exercise of his right to obtain a retrial of a decided question," *United States* v. *Goodwin*, 457 U. S. 368, 377 (1982), it does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial of an already-convicted defendant might be no less vindictive because he did not bring the initial prosecution. Indeed, *Blackledge* referred frequently to actions by "the State," rather than "the prosecutor." *E. g.*, 417 U. S., at 28–29.

We need not determine the correct rule when two independent prosecutors are involved, however. Here the county prosecutor participated fully after the conclusion of proceedings in the Justice of the Peace Court. He was the State's sole representative at the arraignment in Circuit Court, App. 92, assisted at the trial, *id.*, at 94; Tr. of Oral Arg. 9, and presented the initial closing argument to the jury, App. 96. In fact, such participation was a statutory duty. Under the state law then in effect, the county prosecutor was to "assist the district attorney in all criminal cases in the circuit court" in which his county had an interest and "to represent the state in all matters coming before the grand jury of his county." Miss. Code Ann. § 19–23–11 (1972). In these circumstances, the addition of the District Attorney to the prosecutorial team changes little.[5]

Petitioners suggest that we should remand the *Blackledge* issue to the Court of Appeals rather than reach it ourselves. Tr. of Oral Arg. 24. It is true that "[w]hen attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge* v. *Williams*, 397 U. S. 471, 476, n. 6 (1970). Nonetheless, we have little hesitation in deciding the case in its current posture. The due process issue was argued before both the District Court and the Court of Appeals. The State's opposition to the Magistrate's report and its brief to the Court of Appeals are before us. The factual record is adequate, and would not be improved by a remand to the Court of Appeals.[6]

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[5] In both courts below, the State attempted to distinguish *Blackledge* on the ground that the misdemeanor and felony at issue in that case shared specific elements in a way that traffic violations and manslaughter do not. This argument closely resembled their double jeopardy argument, both focusing on the rule set out in *Blockburger* v. *United States*, 284 U. S. 299 (1932). Even if the State is correct that the offenses charged in *Blackledge* had more in common than those charged here, this parsing of the statutes misses the point. *Blackledge* engaged in no such analysis. It noted merely that the "indictment covered the same conduct for which Perry had been tried and convicted." 417 U. S., at 23. That is equally true here. Whatever the congruence, or lack thereof, of the offenses charged, the postappeal felony indictment poses "the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978).

[6] In this regard, we note that the *Blackledge* presumption is rebuttable. See *United States* v. *Goodwin*, *supra*, at 376, n. 8; *Blackledge*, 417 U. S., at 29, n. 7. The State had ample opportunity below to attempt to rebut it but did not do so. Its only argument has been that *Blackledge* should not apply.

And the case is decided by a straightforward application of controlling precedent.

The prosecution of Roberts for manslaughter, following his invocation of his statutory right to appeal his misdemeanor convictions, was unconstitutional. The resulting conviction cannot stand. The judgment of the Court of Appeals is therefore

*Affirmed.*

JUSTICE REHNQUIST, dissenting.

The Court granted certiorari in this case to review a single question presented by the petition for certiorari: whether the Court of Appeals properly applied our decision in *Illinois* v. *Vitale*, 447 U. S. 410 (1980), in sustaining respondent's claim of double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals held that the Clause was a bar to further prosecution on a charge of manslaughter stemming from the death of a 10-year-old child who had been a passenger in the truck involved in a collision with respondent's car. This Court, however, in an unexampled bit of procedural footwork which surely has adverse implications for the "rule of four" principle governing our grants of certiorari, simply refuses to even consider the double jeopardy issue raised by the State in its petition for certiorari. Without any explanation whatever, the Court affirms the judgment of the Court of Appeals on an alternative ground.

The only precedent cited for this unexplained—and I dare say unexplainable—decision is *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977). But that case stands only for the unexceptionable proposition that a respondent may argue to this Court any basis supported by the record for affirming the judgment of the lower court, even though respondent did not cross-petition for certiorari. Nevertheless, in *New York Telephone Co.* the Court decided the issue presented in the petition for certiorari in addition to ruling on the alternative basis for affirmance urged by the respondent. See *id.*, at 174–178. See also *Dandridge* v. *Williams*, 397 U. S. 471 (1970).[1] I believe that the Court is obligated to confront the State's contention that the Court of Appeals misapplied the Double Jeopardy Clause of the Fifth Amendment in this case. The Court being unwilling to undertake that obligation, I turn to it in dissent.

Respondent was tried and convicted of the misdemeanor offense of reckless driving in a Justice Court in Tallahatchie County, Miss., a county in northwestern Mississippi with a population of approximately 17,000 people. He was sentenced to pay a fine of $100 for this offense. As permitted by the Mississippi "two-tier" system, he appealed his conviction to the State Circuit Court where he was entitled to a trial *de novo*. But before he was retried on the misdemeanor charge in the Circuit Court, he was indicted for the felony offense of manslaughter for causing the death of the 10-year-old child who was riding in the truck that respondent struck with his car. The misdemeanor offense was "*nolle prossed*" before trial, but respondent was convicted by a jury of manslaughter and sentenced to 20 years in the custody of the Mississippi Department of Corrections.

Respondent's conviction was affirmed by the Mississippi Supreme Court. *Roberts* v. *State*, 379 So. 2d 514 (1979). After exhausting his state postconviction remedies, respondent filed a petition for federal habeas corpus relief. This writ was granted by the District Court, and the Court of Appeals for the Fifth Circuit affirmed that determination. The Court of Appeals held that "because Roberts has a substantial double jeopardy claim under the Supreme Court's holding in *Illinois* v. *Vitale*, the district court's granting of habeas corpus relief must be affirmed." App. to Pet. for Cert. A13.

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[1] Our decision in *Langnes* v. *Green*, 282 U. S. 531 (1931), is not to the contrary. While in *Langnes* the Court never addressed the errors specified by the petitioner in that case, the Court decided in *Langnes* that the District Court should never have addressed the petitioner's claims in the first instance. See *id.*, at 540–542; cf. *Schlesinger* v. *Councilman*, 420 U. S. 738, 743–744 (1975). When a petitioner's claims should never have been presented to or decided by a federal court in the first instance, a ruling by this Court on those claims would be wholly inappropriate. There being no similar grounds upon which to abstain from deciding any issue raised by this case, the Court should address the question raised by the petitioner.

In reaching this conclusion, I believe that the Court of Appeals mistakenly relied upon a mere form of expression in the Court's opinion in *Illinois* v. *Vitale* to depart from all of our previous double jeopardy holdings in this area. The Court of Appeals apparently felt that the *Vitale* opinion changed governing double jeopardy law to permit a defendant to establish a substantial, and apparently dispositive, claim of double jeopardy merely by showing that the State actually relied upon the same evidence to prove both crimes. While there is one sentence in the Court's opinion in *Vitale* that supports this construction, I do not believe that construction is consistent with the opinion as a whole. Until the present case, the relevant question to be answered by any court is whether the evidence required to prove the statutory elements of crime is the same, not whether the evidence actually used at trial is the same.

In *Vitale* the Supreme Court of Illinois had held that the Double Jeopardy Clause of the Fifth Amendment barred the prosecution of a defendant for manslaughter because the defendant had previously pleaded guilty to a charge of failing to reduce speed arising out of the same incident. This Court vacated the judgment of the Supreme Court of Illinois, saying:

> "The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic

> offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." 447 U. S., at 419.

It seems to me that this is about as clear a statement as there can be of the principle that the double jeopardy inquiry turns on the statutory elements of the two offenses in question, and not on the actual evidence that may be used by the State to convict in a particular case. Nonetheless, the Court went on in *Vitale* to distinguish *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), and in so doing stated:

> "By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." 447 U. S., at 421.

I cannot say that this last expression did not afford the Court of Appeals some ground for the views which it expressed, nor can I say that I think it is entirely consistent with the first quotation from the *Vitale* opinion. But I am reasonably sure that the Court did not intend to transmute the traditional double jeopardy analysis from an either "up or down" inquiry based on the evidence required to prove the statutory elements of a crime into a "substantial claim" inquiry based on the evidence the State introduced at trial. I think that there are ambiguities in *Illinois* v. *Vitale* which urgently need resolution by this Court, that the present case affords an ample opportunity to do this, and that the Court's failure to do it is an unexampled abdication of its responsibility.

I would unambiguously reaffirm the statement in *Brown* v. *Ohio*, 432 U. S. 161 (1977), relied upon in *Illinois* v. *Vitale*, *supra*, that

> "'[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" 432 U. S., at 166, quoting *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932).

Applying that principle to this case, it seems to me that the Court of Appeals was demonstrably wrong in its treatment of the double jeopardy issue. Comparing the elements of the Mississippi reckless driving statute with the Mississippi manslaughter statute, that court said:

> "A narrow focus on the two statutes provides one answer. Proof of manslaughter does not necessarily entail proof of reckless driving, for manslaughter could be proved in a situation completely foreign to a vehicular collision." App. to Pet. for Cert. A10–A11

But the court went on to say that taking into account a "judicial veneer" which had been placed on the statute by the Supreme Court of Mississippi, "it is apparent that manslaughter by automobile cannot be proven without at the same time proving reckless driving. Because the specific felony offense, manslaughter by automobile, is not statutorily defined, this Court is confronted with a novel situation. Depending on whether the focus is on the manslaughter statute alone or on its case law veneer as well, application of the first prong of the *Vitale* analysis gives different results." *Id.*, at A11.

But the Court of Appeals declined to resolve the inquiry based on the elements of the two statutes, as mandated by *Brown*, *supra*, and went on to say that there was a "second prong" of the inquiry based upon the evidence actually presented at trial. Because the same evidence that led to respondent's conviction on the misdemeanor charge was also introduced in the manslaughter trial, respondent was said to have a "substantial claim" of double jeopardy, whatever that phrase may mean. Because respondent had such a "substantial claim," the Court of Appeals set aside a state-court conviction.

I believe that a straightforward analysis of the holding in *Brown* v. *Ohio* requires the conclusion that there was a different element in each of the offenses involved which need not be proved with respect to the other offense. The offense of reckless driving is based on the manner of operation of a motor vehicle upon the public roads, and in no wise requires any result in injury to persons or property. The crime of manslaughter by culpable negligence simply requires the causing of a death with a particular state of mind, and need not in any way involve an automobile.[2]

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[2] The case which the Court of Appeals suggested created a separate, nonstatutory crime of manslaughter by automobile, *Smith* v. *State*, 197 Miss. 802, 20 So. 2d 701 (1945), involved a charge of manslaughter under Miss. Code Ann. § 2232 (1942), which read:

"Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without any authority of law, not provided for in this chapter, shall be manslaughter."

This provision has remained unchanged since the *Smith* decision. See Miss. Code Ann. § 97-3-47 (1972).

That the *Smith* decision did not result in a new crime of manslaughter by automobile should be clear from the following analysis of *Smith* in *Dickerson* v. *State*, 441 So. 2d 536 (Miss. 1983):

"This statute [§ 97-3-47] has been authoritatively construed in *Smith* v. *State*, 197 Miss. 802, 20 So. 2d 701 (1945), a case involving alleged manslaughter with an automobile, to require that, before the defendant may be convicted, the state must prove that he 'was guilty of such gross negligence on the occasion complained of as evince *[sic]* on his part a wanton and reckless disregard for the safety of human life, or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to willfulness.'" *Id.*, at 538 (citing to *Smith* v. *State*, *supra*, at 812, 20 So. 2d, at 703).

At no point in *Dickerson* does the Mississippi Supreme Court suggest that the crime of manslaughter involving use of an automobile is a different crime than any other manslaughter charged under § 97-3-47. In other

The fact that in this particular case the "same evidence" might be used to prove the "reckless" element in the automotive offense and the "culpable negligence" in the manslaughter offense is also not dispositive. For reckless driving a defendant must have driven an automobile, which he need not do to be found guilty of manslaughter; for manslaughter a defendant's act must have caused a death, which is not required for the offense of reckless driving. Applying the "*Blockburger*" test to a question of statutory construction, the Court in *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975), said:

> "[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

Since *Vitale* we have reaffirmed the *Blockburger* test that the evidence required to prove the statutory elements of a crime determines whether particular crimes are the same offense for double jeopardy purposes. See *Missouri* v. *Hunter*, 459 U. S. 359, 367–368 (1983). The actual evidence test which the Court of Appeals inferred from the single sentence in *Vitale* has never been applied to bar a second trial on grounds of double jeopardy.

I would therefore reverse the judgment of the Court of Appeals insofar as it upheld respondent's double jeopardy claim. Because the Court of Appeals did not pass upon respondent's due process claim based upon our decision in *Blackledge* v. *Perry*, 417 U. S. 21 (1974), I would remand the case to that court so it may consider the question in the first instance.

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instances involving prosecutions under the manslaughter statute the State Supreme Court has employed similar language, indicating the juxtaposition of the words "manslaughter" and "motor vehicle" found in *Smith* was nothing more than an effort to illuminate what the court meant by culpable negligence in those circumstances. Cf. *Latiker* v. *State*, 278 So. 2d 398, 399 (1973); *Gregory* v. *State*, 152 Miss. 133, 141–142, 118 So. 906, 909 (1928).

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, dissenting.

For the reasons stated in JUSTICE REHNQUIST's dissent, I believe the Court should address the double jeopardy question decided by the Court of Appeals. I also agree with JUSTICE REHNQUIST that the Court of Appeals' ruling should be vacated and the case remanded for further consideration in light of *Blackledge* v. *Perry*, 417 U. S. 21 (1974). In my view, however, the Court of Appeals' double jeopardy holding should be vacated simply on the ground that jeopardy does not attach in the first tier of a "two-tier" criminal trial.

Two-tier systems for adjudicating less serious criminal cases such as traffic offenses are extremely common. *Colten* v. *Kentucky*, 407 U. S. 104, 112, n. 4 (1972). Indeed, this is our second occasion this Term to review double jeopardy problems arising out of a two-tier trial. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294 (1984). Mississippi's two-tier system is fairly typical. A defendant convicted in a Mississippi justice of the peace court has an absolute right to a trial *de novo* if he chooses to appeal his conviction. See *Calhoun* v. *City of Meridian*, 355 F. 2d 209, 211 (CA5 1966); Miss. Code Ann. § 99-35-1 *et seq.* (1972). In Mississippi, as in Kentucky, "a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea." *Colten* v. *Kentucky*, *supra*, at 119-120.

In these circumstances a defendant is not in "jeopardy" of anything when he undergoes a first-tier trial. The first-tier proceedings

> "offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. . . . In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the [second-tier trial,] with sentence to be

determined by the full record made in that court." 407 U. S., at 118–119.

Respondent Roberts chose not to accept the "offer in settlement" made at his first-tier trial. On August 13, 1977, he was convicted in the first-tier trial and sentenced to pay a fine of $100 on the charge of reckless driving. He filed notice of and perfected an appeal on the same day. The reckless driving misdemeanor charge was eventually consolidated for trial with the manslaughter charge but was not prosecuted further. There is no indication that Roberts ever paid the $100 fine. At oral argument counsel conceded that he probably did not.

This is surely dispositive evidence that Roberts was never in "jeopardy" at his first-tier trial. Though he was tried, convicted, and sentenced at that trial, he effortlessly erased his conviction and suffered no punishment whatsoever for the offense of reckless driving. If Roberts was never in jeopardy at his first-tier trial, the second trial could in no circumstance violate Roberts' constitutional right to avoid being placed twice in jeopardy for the same offense.

Accordingly, I would vacate the judgment below and remand for further consideration in light of *Blackledge* v. *Perry*, *supra*.

# BURNETT ET AL. *v.* GRATTAN ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-264. Argued March 26, 1984—Decided June 27, 1984

Respondents filed an action in a Maryland state court against petitioner officers of the state college where respondents were employed, claiming employment discrimination in violation of, *inter alia*, 42 U. S. C. §§ 1981, 1983, 1985, and 1986 (Civil Rights Acts). Petitioners removed the action to Federal District Court. Because the Civil Rights Acts contain no statute of limitations, the District Court borrowed a 6-month limitations period from a Maryland statute that establishes a procedure for administrative resolution of employment discrimination complaints, and granted petitioners' motion to dismiss the action because the complaint had been filed more than six months after respondents' causes of action had accrued. The Court of Appeals found the 6-month period inappropriate, and, applying Maryland's 3-year statute of limitations for all civil actions for which a statutory limitation period is not otherwise provided, held that the action was not time-barred.

*Held:* While federal courts properly turn to state law for statutes of limitations in actions under the Civil Rights Acts, borrowing the limitations period from an administrative employment discrimination statute was inappropriate. Both the practical differences between litigation and an administrative proceeding and the divergence in the objectives of the federal causes of action and the state administrative procedure lead to this conclusion. On the one hand, the practical difficulties facing an aggrieved person in an action under the Civil Rights Acts involve such matters as recognizing the constitutional dimensions of the claimed injury, obtaining counsel or preparing to proceed *pro se*, establishing the amount of damages, and preparing legal documents. On the other hand, the sole responsibility of an aggrieved person who invokes the state administrative remedies is to make, sign, and file a complaint with the Human Relations Commission, which then has the burden of investigating and developing the case. And the goals of the Civil Rights Acts to compensate persons whose civil rights have been violated and to prevent the abuse of state power are far different from the goals of the state administrative employment procedure. The administrative scheme, including the short statute of limitations, encourages prompt identification, conciliation, and private settlement of employment disputes through the State Commission's intervention. Pp. 47–55.

710 F. 2d 160, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 56. REHNQUIST, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 56.

*Paul F. Strain*, Deputy Attorney General of Maryland, argued the cause for petitioners. With him on the briefs were *Stephen H. Sachs*, Attorney General, and *Diana Gribbon Motz*, *Christine Steiner*, and *Robert A. Zarnoch*, Assistant Attorneys General.

*Sheldon H. Laskin* argued the cause for respondents. With him on the brief were *Laura Metcoff Klaus* and *Joseph M. Sellers*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether a state law, establishing a procedure for administrative resolution of employment discrimination complaints, provides an appropriate statute of limitations for actions brought under the Reconstruction-Era Civil Rights Acts, 42 U. S. C. § 1981 *et seq.* We hold that it does not.

## I

Respondents James Grattan and Adrienne Hedman were employees of Coppin State College, a predominantly Negro college in Maryland. Their primary responsibility was to recruit students of diverse ethnic backgrounds to attend the school. App. 34–39. Respondents received notice in June 1976 that their contracts would not be renewed because the college "was not satisfied with the recruitment efforts of the Minority Affairs office." *Id.*, at 34, 38. In response, respondents, who are white, filed complaints of racial discrimination with the federal Equal Employment Opportunity

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*Neil R. Shortlidge* filed a brief for the League of Kansas Municipalities as *amicus curiae* urging reversal.

*Leon Friedman*, *Charles S. Sims*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Commission. While those claims were pending, they filed suit in state court in February 1977, naming as defendants the petitioners in the present action—the president of the College, the vice president of student affairs, and the chairman and executive director of the board of trustees. In October 1981, on leave of the court,[1] respondents filed an amended complaint, specifically alleging that they were victims of racial discrimination, and, in Hedman's case, gender discrimination, in violation of 42 U. S. C. §§ 1981,[2] 1983,[3] 1985,[4] 1986,[5] and the Equal Protection Clause of the Fourteenth Amendment, and that their discharge also violated the First Amendment and various provisions of the Maryland Constitution. App. 11–33. Petitioners removed the action from state to federal court. Thereafter, they filed a motion to dismiss on the ground that respondents' claims were barred by the applicable statute of limitations. *Id.*, at 39–40.

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[1] Respondents' original state-court action sought a declaratory judgment that their dismissals were arbitrary and without basis in law or fact, and constituted a deprivation of property without due process and a denial of equal protection. App. 6–7. The state court sustained petitioners' supplemental demurrer on the ground that the facts set forth in the complaint did not state a case appropriate for declaratory relief, but granted leave to amend. *Id.*, at 11.

[2] Title 42 U. S. C. § 1981 guarantees the right to be free from racial discrimination in specific activities, such as making contracts and bringing suit.

[3] Title 42 U. S. C. § 1983 confers a private federal right of action for damages and injunctive relief against state actors who deprive any citizen or person within the jurisdiction of the United States of "rights, privileges, or immunities secured by the Constitution and laws." See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961) (constitutional deprivations); *Maine* v. *Thiboutot*, 448 U. S. 1 (1980) (statutory violations).

[4] Title 42 U. S. C. § 1985(3) creates a private right of action for damages for injury or deprivation caused by a conspirator to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

[5] Title 42 U. S. C. § 1986 creates a right to recover damages "in an action on the case" brought within one year after the cause of action has accrued against every person who has knowledge of, and power to prevent, a § 1985 conspiracy, but neglects or refuses to act.

Because the federal statutes under which respondents sued do not themselves contain a statute of limitations, the District Court borrowed a limitations period from a state statute prohibiting discriminatory practices in employment. Md. Ann. Code, Art. 49B, § 9(a) (1979);[6] see App. to Pet. for Cert. 23, 34. The District Court identified a "commonality of purpose" between the federal rights asserted and the rights defined in the state statute, and concluded that it was reasonable to subject the federal claims to the 6-month statute of limitations on filing employment discrimination complaints with an administrative body, the Maryland Human Affairs Commission. *Id.*, at 34–36. Because respondents' complaint had been filed more than six months after their cause of action accrued, the District Court dismissed the suit as time-barred.

The Court of Appeals for the Fourth Circuit, relying on its previous decision in *McNutt* v. *Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F. 2d 676 (1983), found the 6-month period selected by the District Court inappropriate for suits brought under the Civil Rights Acts because the state law "governed the limitation of administrative proceedings which were informal, investigatory and conciliatory in nature." 710 F. 2d 160, 162 (1983). The Court of Appeals applied Maryland's 3-year statute of limitations for all civil actions for which the Code does not otherwise provide a limitations period. Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984).[7] Finding that Grattan's and Hedman's amended complaint stated claims that related back to the action originally filed in the Maryland court some eight months after their cause of action arose,[8] the Court of Appeals held that the action was not time-barred, and remanded to the District Court.

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[6] Maryland assures "all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment." Md. Ann. Code, Art. 49B, § 14 (1979). Article 49B prohibits discrimination in public accommodations and in housing, as well as in employment. §§ 5, 8, 16, 20–22 (1979 and Supp. 1983).

We granted certiorari to resolve confusion in the Circuits regarding reliance upon a state administrative statute of limitations in a federal civil rights suit.[9] 464 U. S. 981 (1983). We now affirm.

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[7] "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Petitioners do not contest here that this is the appropriate state-law statute of limitations for federal civil rights actions if Art. 49B, § 9(a), does not apply.

[8] The District Court held that the First Amendment claim was governed by Maryland's 3-year statute of limitations, but that it, too, was time-barred because it did not relate back, under the analysis required by Federal Rule of Civil Procedure 15, to the action filed in state court. App. to Pet. for Cert. 37-38. That ruling was not appealed. 710 F. 2d, at 162. The Court of Appeals' holding that respondents' other claims relate back to the action filed in state court is not at issue in the present case.

[9] Several Circuits have adopted positions similar to that taken by the Court of Appeals in this case. See, *e. g.*, *Childers* v. *Independent School Dist. No. 1 of Bryan County*, 676 F. 2d 1338, 1342-1343 (CA10 1982) (rejecting applicability of Oklahoma's Political Subdivision Tort Claims Act 120-day limitation on filing administrative claims to public employee's claim of discrimination infringing First Amendment rights, brought under 42 U. S. C. § 1983); *Zuniga* v. *AMFAC Foods, Inc.*, 580 F. 2d 380, 384, n. 5 (CA10 1978) (rejecting Colorado's Anti-Discrimination Act 6-month period in § 1981 action because "limitations periods for state statutory nonjudicial proceedings are inapplicable to civil rights actions in courts of law"), overruled on other grounds, *Garcia* v. *Wilson*, 731 F. 2d 640 (CA10 1984) (en banc) (holding that all § 1983 claims in the Circuit will be characterized uniformly as actions for injuries to personal rights for statute of limitations purposes, rather than in terms of the specific facts generating a particular suit); *Chambers* v. *Omaha Public School Dist.*, 536 F. 2d 222, 225-228 (CA8 1976) (rejecting applicability of Nebraska's Fair Employment Prac-

## II

The century-old Civil Rights Acts do not contain every rule of decision required to adjudicate claims asserted under them. In the absence of specific guidance, Congress has directed federal courts to follow a three-step process to borrow an appropriate rule. 42 U. S. C. § 1988.[10] First, courts are

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tices Act 180-day administrative statute of limitations to public employee's action under 42 U. S. C. §§ 1981, 1983, alleging First and Fourteenth Amendment violations in nonrenewal of contract); *Mason* v. *Owens-Illinois, Inc.*, 517 F. 2d 520, 521–522 (CA6 1975) (rejecting applicability of Ohio's 1-year Civil Rights Act administrative statute of limitations to private employee's claim of racial discrimination in promotion and discharge, brought under 42 U. S. C. § 1981); *Garner* v. *Stephens*, 460 F. 2d 1144, 1147–1148, and n. 1 (CA6 1972) (Kentucky Civil Rights Commission's 90-day statute of limitations); *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.*, 427 F. 2d 476, 488–489 (CA7) (rejecting applicability of Illinois' 120-day Fair Employment Practices Act administrative claim statute of limitations to private employee's § 1981 action), cert. denied, 400 U. S. 911 (1970). But see *Warner* v. *Perrino*, 585 F. 2d 171, 173–175 (CA6 1978) (applying Ohio's 180-day fair housing law limitations period to § 1982 action); *Green* v. *Ten Eyck*, 572 F. 2d 1233, 1237–1238 (CA8 1978) (Missouri's 180-day fair housing law barred §§ 1981, 1982 claims, but not § 1983 claim against state officials); *Warren* v. *Norman Realty Co.*, 513 F. 2d 730, 733–735 (CA8) (applying Nebraska's Civil Rights Act 180-day limitation to housing discrimination claim filed under §§ 1981, 1982, where state law specifically creates a civil action for private litigants as alternative to administrative relief), cert. denied, 423 U. S. 855 (1975).

The First Circuit has upheld reliance upon administrative statutes of limitations. See, *e. g.*, *Burns* v. *Sullivan*, 619 F. 2d 99 (applying Massachusetts Commission Against Discrimination 6-month limitation on filing administrative complaints in public employee's action under 42 U. S. C. § 1983), cert. denied, 449 U. S. 893 (1980). The First Circuit has followed *Burns* in *Carter* v. *Supermarkets General Corp.*, 684 F. 2d 187, 189 (1982) (private employee, § 1981 action); *Holden* v. *Commission Against Discrimination of Massachusetts*, 671 F. 2d 30 (claim of racially motivated discharge brought under 42 U. S. C. §§ 1983, 1985), cert. denied, 459 U. S. 843 (1982); *Hussey* v. *Sullivan*, 651 F. 2d 74 (1981) *(per curiam)* (claim of political discrimination under 42 U. S. C. §§ 1983, 1985(3)).

[10] Title 42 U. S. C. § 1988 provides in pertinent part:

"The jurisdiction . . . conferred on the district courts by the [civil and criminal Civil Rights Titles] for the protection of all persons in the United to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." *Ibid.* If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." *Ibid.*

### A

The task before the courts in the present case was to identify a limitations period governing respondents' claims under 42 U. S. C. §§ 1981, 1983, 1985, and 1986.[11] The Civil Rights Acts do not provide the rule. Only 42 U. S. C. § 1986 contains a statute of limitations.[12] Other sources of federal law

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States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ."

For discussion of the history of 42 U. S. C. § 1988 and its complementary role in the scheme of federal civil rights legislation, see *Moor* v. *County of Alameda*, 411 U. S. 693, 702, and n. 13, 703–706, and nn. 18–19 (1973).

[11] Neither the District Court, the Court of Appeals, nor the parties have suggested that the statute of limitations inquiry would vary depending on the particular federal civil rights statute under which a person claimed relief. That issue is not presented to us.

[12] Because our affirmance of the Court of Appeals' judgment reinstates respondents' claims (with the exception of the First Amendment claim, n. 8, *supra*), we have no occasion to discuss the District Court's conclusion that the explicit 1-year statute of limitations in § 1986 did not control that claim because the related § 1985 claim was time-barred by the state-law 6 months' limitations period.

are no more helpful. On several occasions, this Court has rejected arguments that a particular federal statute of limitations applied, *O'Sullivan* v. *Felix*, 233 U. S. 318, 324–325 (1914) (rejecting federal statute of limitations for suits for a penalty, because civil actions under Civil Rights Act are remedial), or has implicitly rejected linkage with other federal statutes, emphasizing the independence of the remedial scheme established by the Reconstruction-Era Acts. See, *e. g., Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–461 (1975) (§ 1981 and Title VII (Equal Employment Opportunity) of the Civil Rights Act of 1964 provide independent rights and remedies); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 416–417, and n. 20 (1968) (enactment of Title VIII (Fair Housing) of the Civil Rights Act of 1968 "had no effect upon § 1982"). It is now settled that federal courts will turn to state law for statutes of limitations in actions brought under these civil rights statutes. See, *e. g., Chardon* v. *Fumero Soto*, 462 U. S. 650, 655–656 (1983).

## B

We have described in a variety of ways the task of a court when determining which of a set of arguably relevant state statutes of limitations should govern a suit brought under the Civil Rights Acts. For example, in *Johnson* v. *Railway Express Agency, supra*, at 462, an action brought under 42 U. S. C. § 1981, we described the goal as that of identifying the "most appropriate" state statute of limitations. In *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483–484 (1980), an action under § 1983, we suggested that the court should select "the state law of limitations governing an analogous cause of action." See also *Johnson* v. *Railway Express Agency, supra*, at 469 ("that [period of limitations] which the State would apply if the action had been brought in a state court") (MARSHALL, J., concurring in part and dissenting in part). We agree with the Court of Appeals that the District Court's selection of Art. 49B of the Maryland Code was erroneous under this approach. The functional differences between the federal causes of action and the state administrative law make Art. 49B an inappropriate analog from which to borrow to effectuate Congress' purpose in enacting the Civil Rights Acts.

In the Civil Rights Acts, Congress established causes of action arising out of rights and duties under the Constitution and federal statutes. These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance. The statutes are characterized by broadly inclusive language. They do not limit who may bring suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief. An appropriate limitations period must be responsive to these characteristics of litigation under the federal statutes. A state law is not "appropriate" if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts.

Applying these criteria for disqualifying a particular state law, we begin with the observation that borrowing an administrative statute of limitations ignores the dominant characteristic of civil rights actions: they belong in court. *McDonald* v. *West Branch*, 466 U. S. 284, 290 (1984). Assuring the full availability of a judicial forum necessitates attention to the practicalities of litigation. Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed *pro se*. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules;[13] he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed *in forma pauperis*, and file and serve his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.

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[13] Although the pleading and amendment of pleadings rules in federal court are to be liberally construed, the administration of justice is not well served by the filing of premature, hastily drawn complaints. The recent revision of Federal Rule of Civil Procedure 11 emphasizes that an attorney

The practical difficulties facing an aggrieved person who invokes administrative remedies are strikingly different. Maryland's scheme is modeled on Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and is typical of statutes in some 30 States. See Pet. for Cert. 10, and n. 7. A person's sole responsibility under this scheme is to "make, sign and file with the Human Relations Commission . . . a complaint in writing under oath." Md. Ann. Code, Art. 49B, § 9(a) (1979). The complaint need contain no more than the name and address of the person or entity alleged to have committed the discriminatory act, "the particulars thereof," and "other information as may be required from time to time by the Commission." *Ibid.* Although the complainant is potentially liable for a malicious filing, § 12(b), he has no obligation to investigate his allegations more fully. The entire burden of investigating and developing the case rests on the Human Rights Commission, which is empowered to issue subpoenas, conduct hearings, and seek judicial enforcement of its orders. §§ 11–12.

When a legislature selects a statute of limitations to govern a particular cause of action, it takes into account the burdens borne by the parties to a suit of that sort. Article 49B,

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or *pro se* litigant certifies that "to the best of his knowledge, information, and belief formed after reasonable inquiry [a complaint] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

§ 9(a), tells a person when he must act if he wishes to request the aid of the Human Rights Commission in resolving an employment discrimination dispute. The time limit established by the Maryland Legislature reflects in part the minimal burden state law places on the administrative complainant, which does not correspond in any significant way to the substantial burden federal law places on a civil rights litigant.[14] Indeed, Maryland's administrative procedure acknowledges these different burdens. Where a complainant has only six months to initiate a grievance, the Human Affairs Commission—which after receiving notice of the complaint essentially assumes the role of "litigant"—may engage in investigation and negotiations toward settlement for at least two years before bringing formal charges against an employer. Code of Maryland Regulations 14.03.01.01–14.03.01.03.A (1983).

A legislative definition of a statute of limitations also reflects a policy assessment of the state causes of action to which it applies. *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 367 (1977) ("State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies"). For instance, the length of a limitations period will be influenced by the legislature's determination of the importance of the underlying state claims, the need for repose for potential defendants, considerations of judicial or administrative economy, and the relationship to other state policy goals. To the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Acts, the resulting state statute of limitations may be inappropriate for civil rights claims.[15]

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[14] It is true that we have "borrowed" a 6-month administrative statute of limitations in the labor context, *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), but we do not find that decision relevant to the civil rights issue before us. In *DelCostello*, we held that the limitations period fixed by § 10(b) of the National Labor Relations Act for filing unfair labor practice claims with the National Labor Relations Board offered the most analogous limitations period for suits alleging breaches of the collective-bargaining agreement. The importance of uniformity in the labor law field, and "the realities of labor relations and litigation," *id.*, at 167, informed our decision *not* to adopt a state statute of limitations that would be at odds with the purpose of the substantive federal law. Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases. See *Robertson* v. *Wegmann*, 436 U. S. 584, 594, n. 11 (1978). Moreover, the state administrative statute here, unlike the federal statute we relied on in *DelCostello*, is not functionally related to Congress' policy enacted in the relevant substantive law.

The divergence between the goals of the federal civil rights statutes and of the state employment discrimination administrative statute is clear in the present case. The goals of the federal statutes are compensation of persons whose civil rights have been violated, and prevention of the abuse of state power. *Board of Regents* v. *Tomanio*, 446 U. S., at 488; *Robertson* v. *Wegmann*, 436 U. S. 584, 590–591 (1978). That these are not the goals of the statute empowering Maryland's administrative agency to resolve employment discrimination complaints is apparent both because the remedial authority of the agency is limited,[16] and because the state scheme does not create a private right of action.[17] The stated goal of the state administrative procedure is the prompt identification and resolution of employment disputes. The administrative scheme, including a short statute of limitations, encourages conciliation and private settlement through the agency's intervention in live disputes.

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[15] To this degree the second and third steps of the § 1988 inquiry shade into each other. The step three inquiry—whether a state rule of decision is inconsistent with the Constitution or federal law—is not necessary to resolve this case, but must be made, for example, when a state legislature has enacted a statute of limitations specifically applicable to actions brought under one or all of the Reconstruction Civil Rights Acts. See, *e. g.*, *Johnson* v. *Davis*, 582 F. 2d 1316 (CA4 1978) (rejecting Virginia's express 1-year statute of limitations for § 1983 actions as discriminating against federal cause of action). See also *Campbell* v. *Haverhill*, 155 U. S. 610, 615 (1895) (patent action) (state statute of limitations must operate uniformly on state and federal rights, and "must give a party a reasonable time to sue").

[16] If the Human Affairs Commission concludes that an employer has violated the statute, it has authority to issue a cease-and-desist order, which may include reinstatement or hiring, with or without backpay limited to a 2-year period, and other equitable relief. Md. Ann. Code, Art. 49B,

Petitioners urge the prompt assertion and resolution of public employee disputes in particular, noting that this important policy "is clearly mirrored in . . . an abbreviated period for the filing of claims of employment discrimination with the state fair employment practices agency," enacted in Maryland and most other States. Brief for Petitioners 30, and n. 19. That policy, keyed to a classification of plaintiffs, cannot pre-empt the broadly remedial purposes of the Civil Rights Acts, which make no distinction among persons who may look to the court to vindicate their federal constitutional rights. If the statute of limitations in Art. 49B is "abbreviated" precisely because it effectuates the narrower state goal, a federal court should look elsewhere in state law for an appropriate limitations period.

Similarly, the state petitioners argue that the short limitations period in Art. 49B should be applied here because it affords public officers "some reasonable protection from the seemingly endless stream of unfounded, and often stale, lawsuits brought against them." Brief for Petitioners 30. This contention undercuts rather than buttresses the case for applying the limitations period embodied in Art. 49B to federal civil rights actions. The statement suggests that the legisla-

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§ 11(e) (1979). At the time of the District Court's decision, monetary damages were not available to public employees. § 7(b) (1979). Maryland has since amended the law. 1980 Md. Laws, ch. 568.

[17] Maryland's administrative procedure provides for judicial review on the record of a final administrative decision. Md. Ann. Code, Art. 49B, § 12 (Supp. 1983). The statute does not create a private right of action, nor provide for *de novo* judicial consideration of an employment discrimination complaint. § 12(a). These restrictions limit the state procedure in deterring employment discrimination.

tive choice of a restrictive 6-month limitations period reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims. That policy is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. See *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972); *Griffin* v. *Breckenridge*, 403 U. S. 88, 97 (1971); *McNeese* v. *Board of Education*, 373 U. S. 668, 671–672 (1963); *Monroe* v. *Pape*, 365 U. S. 167, 173 (1961).[18]

## III

In sum, the Court of Appeals properly applied the tests established by our prior cases for determining whether a particular state statute of limitations should control a suit brought under the Civil Rights Acts. Both the practical differences between the administrative proceeding contemplated by the Maryland statute and a civil action in a federal court, and the divergence in the objectives of the state administrative procedure to resolve employment discrimination suits and a federal cause of action to vindicate constitutional rights, lead us to conclude that borrowing the limitations period from Maryland's Art. 49B was inappropriate. The judgment of the Court of Appeals is therefore

*Affirmed.*

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[18] As the Court of Appeals for the Second Circuit has noted, "[i]t would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Pauk* v. *Board of Trustees of City University of New York*, 654 F. 2d 856, 862 (1981) (rejecting applicability of 1-year and 90-day limitation period in N. Y. Gen. Mun. Law § 50–i (McKinney Supp. 1983–1984) for actions against city or its employees to action brought under § 1983), cert. denied, 455 U. S. 1000 (1982).

JUSTICE POWELL, concurring in the judgment.

The question is what is the appropriate statute of limitations applicable to this Maryland employment discrimination case under 42 U. S. C. §§1981, 1983, and 1985(3). The Court of Appeals in *McNutt* v. *Duke Precision Dental Orthodontic Laboratories, Inc.*, 698 F. 2d 676 (CA4 1983), and again in this case, held that in all claims for which no other limitations period is specifically provided, Maryland's general 3-year period of limitations is the most appropriate for federal courts to apply in actions under the Reconstruction Civil Rights Acts. The Court of Appeals rejected petitioners' reliance on Maryland's 6-month period of limitations applicable to state administrative complaints of employment discrimination. As petitioners have adduced no persuasive reason to doubt that the Court of Appeals correctly decided this question, I agree with the judgment of the Court.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concurring in the judgment.

I concur in the judgment of the Court, agreeing with the Court of Appeals that in these circumstances the statute of limitations imposed on administrative complaints filed under Md. Ann. Code, Art. 49B, § 9(a) (1979), is not the most appropriate statute of limitations to be applied in this case. I write separately because I cannot agree with the standard by which the Court purports to reach this result. In my view, the search for the most appropriate statute of limitations should begin with determining the intent of the state legislature in enacting a particular statute of limitations.

The task before us is straightforward: we are to examine Maryland law to determine what is the most appropriate statute of limitations to apply to respondents' lawsuit. The Court is presented with this task because Congress has seen fit not to prescribe a specific statute of limitations to govern actions under most of the federal civil rights statutes, instead directing courts to apply state law if "not inconsistent" with federal law. See 42 U. S. C. § 1988; cf. § 1986 (setting a 1-year statute of limitations). The Court addresses the question before us by assuming that certain functional differences may exist between claims asserted under the federal civil rights laws and claims asserted under state law. Under this approach, the appropriateness of a particular state statute of limitations for purposes of borrowing in a federal civil rights action depends on whether the state law reflects the "practicalities" that attend litigation under the federal civil rights statutes and embodies policies "analogous" to those of the federal civil rights statutes. But the test prescribed by the Court is consistent neither in principle nor in practice with our prior decisions.

I part ways with the majority, first of all, with its view of the "practicalities" of litigation that so trouble the Court. These seeming difficulties are hardly unique to respondents' claims or any other garden-variety federal civil rights claim. The Court apparently believes that a person asserting a federal civil rights claim must undertake an involved investigation preparatory to filing suit. See *ante*, at 50–51. The basis for this assumption is not clear. The Federal Rules require nothing more than a plain statement of the grounds for relief, Fed. Rule Civ. Proc. 8(a), while the Rules of discovery that enable a party to develop his case fully prior to trial come into play after suit has been filed. To be sure, at least a modicum of investigation should be necessary before initiating suit: the amount will depend not on the fact that a federal civil rights claim is being asserted, but on the particular facts that give rise to a claim. But there is nothing inherent in a claim asserted under § 1981, § 1983, or § 1985, in light of modern pleading rules, that makes such a claim invariably more difficult to investigate than a claim asserted under state law. Cf. *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 464 (1975).

It is true that a longer statute of limitations will give a person more time to reflect and to recognize that he may have some means of relief. But that common-sense truism hardly qualifies as a "practicality" that should ordinarily affect a court's analysis whether to borrow a particular state statute of limitations. Were it otherwise, a federal court should always prefer a longer statute of limitations over an alternative, but shorter, period, a type of approach we have rejected before. Cf. *Robertson* v. *Wegmann*, 436 U. S. 584 (1978). While the "practicalities" of preparing a case may have some relevance to the question whether a state statute of limitations should be applied, see *ante*, at 53, the Court's focus on the "practicalities" of filing a lawsuit alleging a federal civil rights claim do not illuminate any convincing reason why the limitations period contained in Md. Ann. Code, Art. 49B, § 9(a) (1979), is inconsistent with federal law.

The second part of the Court's proposed test for determining whether to apply a particular state statute of limitations is whether the state policies underlying the statute of limitations reflect policies "analogous"—whatever that may mean—to federal civil rights claims. From the application of that principle to this case, the Court seems to believe that the basic purpose underlying the federal civil rights statutes, vindication of a violation of a federal right, necessitates a statute of limitations that is both general in the remedies it encompasses and nondiscriminatory between the federal plaintiffs bringing suit. The logical result of this approach is that a federal court should always prefer a general statute of limitations to any specific state statute of limitations directed at a particular type of claim or involving a particular party as plaintiff or defendant. Thus, a general catchall statute of limitations, or one covering all forms of invasions of personal rights, would be the appropriate statute of limitations to govern nearly all federal civil rights actions.

This approach, of course, means that any federal civil rights action grounded on a contract claim could avoid the statute of limitations applying to contract claims, or that a claim against a state-employed doctor, though alleging only malpractice, might benefit from a longer statute of limitations than ordinarily applying to medical malpractice actions. This desire for uniform treatment of federal civil rights claims is at odds with the fact that Congress has seen no need to establish a uniform approach in federal civil rights actions. *Board of Regents* v. *Tomanio*, 446 U. S. 478, 489 (1980); *Robertson* v. *Wegmann*, 436 U. S., at 593, n. 11. More significantly, it fails to recognize that a state statute of limitations can still be consistent with federal law notwithstanding the fact that the particular statute of limitations applies only to a particular class of claims cognizable under a federal civil rights statute, or involves a particular class of parties.

On several occasions the Court has addressed the issue of whether a limitations period is inconsistent with the federal policy embodied in the civil rights statutes. In *Robertson*, for example, we indicated that the dual policies of preventing the abuse of state power and compensating victims for violations of federal rights were the yardsticks by which any state limitations period must be measured. *Id.*, at 591. We developed the concept of inconsistency further in *Tomanio*, *supra*, where we observed that to gauge consistency, "the state and federal policies which the respective legislatures sought to foster must be identified and compared." *Id.*, at 487. We went on to affirm in that case that statutes of limitations have "long been respected as fundamental to a well-ordered judicial system," *ibid.*, and to state that "in general, state policies of repose cannot be said to be disfavored in federal law," *id.*, at 488. Finally, in *Johnson* v. *Railway Express Agency*, *supra*, the Court addressed the question of inconsistency to determine whether an otherwise applicable state 1-year statute of limitations should be tolled pending federal administrative proceedings. We rejected the petitioner's contention in *Johnson* that state rules for tolling were inconsistent with federal law, since they forced him to bring a § 1981 claim during the pendency of federal agency proceedings. We noted that there was not "anything peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Id.*, at 464.

The Court, of course, purports to measure the statute of limitations in this case against the relevant federal policies forming the basis of respondents' cause of action. See *ante*, at 53–55. Under the Court's reasoning, however, the policies of repose and prevention of stale claims that generally underlie limitations statutes will always be of marginal relevance to compensating victims of violations of federal rights. Thus, the approach adopted by the Court utterly disregards our earlier observation, also in *Robertson*, that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." 436 U. S., at 593.

Congress, moreover, has instructed federal courts to refer to state statutes when federal law does not provide a rule of decision for actions brought under one of the civil rights statutes. See 42 U. S. C. § 1988. This admonition is more than a mere "technical obstacle to be circumvented if possible." *Tomanio, supra*, at 484. Only if state law is "inconsistent with the Constitution and laws of the United States," 42 U. S. C. § 1988, are federal courts free to disregard otherwise applicable state statutes of limitations. As our decision in *Tomanio* made clear, the intent of the state legislature in enacting a particular limitations statute is extremely relevant to determining whether the applicable state law is inconsistent with federal law. The conclusion that I reach is that if the legislature has indicated that a particular statute of limitations should apply to a claim, that statute is prima facie the most appropriate statute of limitations to apply to a federal civil rights action.

Congress, however, has prescribed limits to this reliance on legislative intent in 42 U. S. C. § 1988. Plainly, if the state statute of limitations discriminates against federal claims, such that a federal claim would be time-barred, while an equivalent state claim would not, then the state law is inconsistent with federal law. Alternatively, if the state statute of limitations fails to afford a reasonable time to the federal claimant, then state legislative intent can also be disregarded. Exactly what constitutes a reasonable time, however, is not to be determined *a priori*. The willingness of Congress to impose a 1-year limitations period in 42 U. S. C. § 1986 demonstrates that at least a 1-year period is reasonable. In another context we have been willing to impose a 6-month limitations period on a federal claimant, in circumstances where the "practicalities" of litigation seem materially the same as in this case. *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983). Even shorter periods of limitation might be permissible, if the state interest in repose is strong and the nature of the claim is such that the magnitude of the harm is readily ascertainable in a short period.

I agree with the court below that it is unlikely that the Maryland Legislature intended for the 6-month statute of limitations embodied in Md. Ann. Code, Art. 49B, § 9(a) (1979), to apply to the federal civil rights claims asserted in this case. Unlike the Court, however, I do not believe that the "practicalities" of litigation necessarily mean that a 6-month limitations period is an unreasonable time in which to bring a federal cause of action. Perhaps if the legislative intent had been clear, borrowing the administrative statute of limitations would have been consistent with the underlying federal policies embodied in these civil rights statutes. On the other hand, the differences between the two types of claims, one judicial, the other administrative, reinforce the conclusion that the Maryland Legislature did not intend that Art. 49B, § 9(a), apply to federal civil rights claims. Thus, to this limited extent, the "practicalities" of litigation bear on the question whether the state legislature intended for the statute to apply to this federal claim.

In sum, I believe that the correct inquiry is to examine the intent of the state legislature in enacting a statute of limitations. If that inquiry indicates that the legislature would have intended that statute to apply to the particular claim before the court, then the court must apply that limitations period, unless the statute discriminates against the federal claim or does not afford a reasonable amount of time in which to bring the claim. Since it appears that the legislature did not intend that Md. Ann. Code, Art. 49B, apply to respondents' claims, I would affirm the decision of the Court of Appeals.

# UNITED STATES *v.* YERMIAN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-346. Argued March 27, 1984—Decided June 27, 1984

Title 18 U. S. C. § 1001 provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements . . . shall be fined . . . ." Respondent was convicted in Federal District Court of violating § 1001 on the basis of false statements he furnished his defense contractor employer in connection with a Department of Defense security questionnaire. At trial, respondent admitted having actual knowledge of the falsity of the statements, but requested a jury instruction requiring the Government to prove not only that he had actual knowledge of the falsity but also that he had actual knowledge that the statements were made in a matter within the jurisdiction of a federal agency. The District Court rejected this request and instead, over respondent's objection, instructed the jury that the Government must prove that respondent "knew or should have known" that the information was to be submitted to a federal agency. The Court of Appeals reversed, holding that the District Court erred in failing to give respondent's requested instruction.

*Held:* Both the plain language and legislative history of § 1001 establish that proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction under the statute. Pp. 68-75.

(a) Any natural reading of § 1001 establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious or fraudulent statements," and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency. Once this is clear, there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction. Pp. 68-70.

(b) The legislative history supports the plain language of the statute. That Congress, when it amended the statute in 1934 and 1948, did not include any requirement that the prohibited conduct be undertaken with specific intent to *deceive* the Government, or with *actual knowledge* that false statements were made in a matter within federal agency jurisdiction, provides convincing evidence that the statute does not require actual knowledge of federal involvement. Nor is there any support in the legislative history that the term "knowingly and willfully" modifies the phrase "in any matter within the jurisdiction of [a federal] agency." Pp. 70–74.

(c) Respondent's argument that absent proof of actual knowledge of federal agency jurisdiction, § 1001 becomes a "trap for the unwary," imposing criminal sanctions on innocent conduct, is not sufficient to overcome the express statutory language of § 1001 and does not authorize this Court to amend the statute in a manner unintended by Congress. Pp. 74–75.

708 F. 2d 365, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 75.

*Carolyn F. Corwin* argued the cause for the United States. With her on the briefs were *Solicitor General Lee, Assistant Attorney General Trott,* and *Deputy Solicitor General Frey.*

*Stephen J. Hillman,* by appointment of the Court, 464 U. S. 1036, argued the cause for respondent. With him on the brief was *James R. Dunn.*

JUSTICE POWELL delivered the opinion of the Court.

It is a federal crime under 18 U. S. C. § 1001 to make any false or fraudulent statement in any matter within the jurisdiction of a federal agency.[1] To establish a violation of § 1001, the Government must prove beyond a reasonable doubt that the statement was made with knowledge of its falsity. This case presents the question whether the Government also must prove that the false statement was made with actual knowledge of federal agency jurisdiction.

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[1] That section provides in full:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

## I

Respondent Esmail Yermian was convicted in the District Court of Central California on three counts of making false statements in a matter within the jurisdiction of a federal agency, in violation of § 1001. The convictions were based on false statements respondent supplied his employer in connection with a Department of Defense security questionnaire. Respondent was hired in 1979 by Gulton Industries, a defense contractor. Because respondent was to have access to classified material in the course of his employment, he was required to obtain a Department of Defense Security Clearance. To this end, Gulton's security officer asked respondent to fill out a "Worksheet For Preparation of Personnel Security Questionnaire."

In response to a question on the worksheet asking whether he had ever been charged with any violation of law, respondent failed to disclose that in 1978 he had been convicted of mail fraud, in violation of 18 U. S. C. § 1341. In describing his employment history, respondent falsely stated that he had been employed by two companies that had in fact never employed him. The Gulton security officer typed these false representations onto a form entitled "Department of Defense Personnel Security Questionnaire." Respondent reviewed the typed document for errors and signed a certification stating that his answers were "true, complete, and correct to the best of [his] knowledge" and that he understood "that any misrepresentation or false statement . . . may subject [him] to prosecution under section 1001 of the United States Criminal Code." App. 33.

After witnessing respondent's signature, Gulton's security officer mailed the typed form to the Defense Industrial Security Clearance Office for processing. Government investigators subsequently discovered that respondent had submitted false statements on the security questionnaire. Confronted with this discovery, respondent acknowledged that he had responded falsely to questions regarding his criminal record and employment history. On the basis of these false statements, respondent was charged with three counts in violation of § 1001.

At trial, respondent admitted to having actual knowledge of the falsity of the statements he had submitted in response to the Department of Defense security questionnaire. He explained that he had made the false statements so that information on the security questionnaire would be consistent with similar fabrications he had submitted to Gulton in his employment application. Respondent's sole defense at trial was that he had no actual knowledge that his false statements would be transmitted to a federal agency.[2]

Consistent with this defense, respondent requested a jury instruction requiring the Government to prove not only that he had actual knowledge that his statements were false at the time they were made, but also that he had actual knowledge that those statements were made in a matter within the jurisdiction of a federal agency.[3] The District Court rejected that request and instead instructed the jury that the Government must prove that respondent "knew or should have known that the information was to be submitted to a government agency."[4] Respondent's objection to this instruction was overruled, and the jury returned convictions on all three counts charged in the indictment.

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[2] Respondent maintained this defense despite the fact that both the worksheet and the questionnaire made reference to the Department of Defense, and the security questionnaire signed by respondent was captioned "Defense Department." The latter document also contained a reference to the "Defense Industrial Security Clearance Office," stated that respondent's work would require access to "secret" material, and informed respondent that his signature would grant "permission to the Department of Defense to obtain and review copies of [his] medical and institutional records." App. 29, 32. Nevertheless, respondent testified that he had not read the form carefully before signing it and thus had not noticed either the words "Department of Defense" on the first page or the certification printed above the signature block.

[3] Respondent's proposed instruction would have informed the jury:

"Unless you find, beyond a reasonable doubt, that defendant knew his statements were being made to the United States Department of Defense, you must acquit." Defendant's Proposed Instruction No. 9, App. 49.

The Court of Appeals for the Ninth Circuit reversed, holding that the District Court had erred in failing to give respondent's requested instruction. 708 F. 2d 365 (1983). The Court of Appeals read the statutory terms "knowingly and willfully" to modify both the conduct of making false statements and the circumstance that they be made "in any matter within the jurisdiction of [a federal agency]." The court therefore concluded that "as an essential element of a section 1001 violation, the government must prove beyond a reasonable doubt that the defendant knew at the time he made the false statement that it was made in a matter within the jurisdiction of a federal agency." *Id.*, at 371 (footnotes omitted). The Court of Appeals rejected the Government's argument that the "reasonably foreseeable" standard provided by the District Court's jury instructions satisfied any element of intent possibly associated with the requirement that false statements be made within federal agency jurisdiction. *Id.*, at 371–372.

The decision of the Court of Appeals for the Ninth Circuit conflicts with decisions by the three other Courts of Appeals that have considered the issue. *United States* v. *Baker*, 626 F. 2d 512 (CA5 1980); *United States* v. *Lewis*, 587 F. 2d 854 (CA6 1978) *(per curiam); United States* v. *Stanford*, 589 F. 2d 285 (CA7 1978), cert. denied, 440 U. S. 983 (1979). We granted certiorari to resolve the conflict, 464 U. S. 991 (1983), and now reverse.

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[4] The jury instructions concerning the essential elements of a § 1001 violation read in full:

"Three essential elements are required to be proved in order to establish the offense charged in the indictment:

"FIRST: That the defendant made and used, or caused to be made and used, a false writing or document in relation to a matter within the jurisdiction of a department or agency of the United States, as charged;

"SECOND: That he did such act or acts with knowledge of the accused that the writing or document was false or fictitious and fraudulent in some material particular, as alleged;

"THIRD: That the defendant knew or should have known that the information was to be submitted to a government agency;

"FOURTH: That he did such act or acts knowingly and willfully." *Id.*, at 25.

## II

The only issue presented in this case is whether Congress intended the terms "knowingly and willfully" in § 1001 to modify the statute's jurisdictional language, thereby requiring the Government to prove that false statements were made with actual knowledge of federal agency jurisdiction.[5] The issue thus presented is one of statutory interpretation. Accordingly, we turn first to the language of the statute.

### A

The relevant language of § 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined . . . ."

The statutory language requiring that knowingly false statements be made "in any matter within the jurisdiction of any department or agency of the United States" is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern. Jurisdictional language need not contain the same culpability requirement as other elements of the offense. Indeed, we have held that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *United States* v. *Feola,* 420 U. S. 671, 676–677, n. 9 (1975). Certainly in this case, the statutory language makes clear that Congress did not intend the terms "knowingly and willfully" to establish the standard of culpability for the jurisdictional element of § 1001. The jurisdictional language appears in a phrase separate from the prohibited conduct modified by the terms "knowingly and willfully." Any natural reading of § 1001, therefore, establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious or fraudulent statements," and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency.[6] Once this is clear, there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction. The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be "knowingly made in a matter within federal agency jurisdiction," or "with the intent to deceive the Federal Government." On its face, therefore, § 1001 requires that the Government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that those statements were made with actual knowledge of federal agency jurisdiction.[7] Respondent's argument that the legislative history of the statute supports a contrary interpretation is unpersuasive.

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[5] The Government never objected to the District Court's instruction requiring proof that respondent reasonably *should have known* that his false statements were made within the jurisdiction of a federal agency. Thus, in this case the Government was required to prove that federal agency jurisdiction was reasonably foreseeable. See n. 14, *infra*.

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[6] The structure of the statutory language found in the 1934 predecessor to § 1001 made the issue equally clear. The jurisdictional language of that provision appeared as a separate phrase at the end of the description of the prohibited conduct and provided in pertinent part:

"[W]hoever shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined." Act of June 18, 1934, ch. 587, 48 Stat. 996.

The most natural reading of this version of the statute also establishes that "knowingly and willfully" applies only to the making of false or fraudulent statements and not to the predicate facts for federal jurisdiction.

### B

The first federal criminal statute prohibiting the making of a false statement in matters within the jurisdiction of any federal agency was the Act of October 23, 1918 (1918 Act), ch. 194, 40 Stat. 1015.[8] That Act provided in pertinent part:

> "[W]hoever, . . . for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, . . . shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations . . . shall be fined . . . ."

Interpreting that provision in *United States* v. *Cohn*, 270 U. S. 339 (1926), this Court held that only false statements made with intent to cause "pecuniary or property loss" to the Federal Government were prohibited. *Id.*, at 346–347. The Court rejected the Government's argument that the terms "with the intent of . . . defrauding" the Federal Government "should be construed as being used not merely in its primary sense of cheating the Government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means." *Id.*, at 346. The Court reasoned that if Congress had intended to prohibit all intentional deceit of the Federal Government, it would have used the broad language then employed in § 37 of the Penal Code, which "by its specific terms, extends broadly to every conspiracy 'to defraud the United States in any manner and for any purpose,' with no words of limitation whatsoever." *Ibid.*

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[7] Because the statutory language unambiguously dispenses with an actual knowledge requirement, we have no occasion to apply the principle of lenity urged by the dissent. See *McElroy* v. *United States*, 455 U. S. 642, 658 (1982); *United States* v. *Bramblett*, 348 U. S. 503, 509–510 (1955) (although "criminal statutes are to be construed strictly . . . , this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

[8] The earliest predecessor of the 1918 Act limited its criminal sanctions to false claims made by military personnel and presented to "any person or officer in the civil or military service of the United States." Act of Mar. 2, 1863, 12 Stat. 696. The Act was extended in 1873 to cover "every person"—not merely military personnel—who presented a false claim to an officer or agent of the United States. Act of Dec. 1, 1873, approved June 22, 1874. In 1908 and 1909, the penalties of the Act were changed, and the statutory provision was redesignated as § 35. Act of May 30, 1908, 35 Stat. 555; Act of Mar. 4, 1909, 35 Stat. 1088. The 1918 Act revised § 35 and added the false-statements provision relevant here. 40 Stat. 1015.

Concerned that the 1918 Act, as thus narrowly construed, was insufficient to protect the authorized functions of federal agencies from a variety of deceptive practices, Congress undertook to amend the federal false-statements statute in 1934.[9] The 1934 provision finally enacted, however, rejected the language suggested in *Cohn*, and evidenced a conscious choice not to limit the prohibition to false statements made with specific intent to deceive the Federal Government.

The first attempt to amend the false-statements statute was unsuccessful. After debates in both Houses, Congress passed H. R. 8046. That bill provided in pertinent part:

> "[E]very person who *with the intent to defraud the United States* knowingly or willfully makes . . . any false or fraudulent . . . statement, . . . concerning or pertaining to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States, . . . shall be punished by . . . fine . . . or by imprisonment . . . , or by

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[9] See H. R. Rep. No. 829, 73d Cong., 2d Sess., 1–2 (1934); 78 Cong. Rec. 3724 (1934).

> both . . . ." 78 Cong. Rec. 3724 (1934) (emphasis added).[10]

President Roosevelt, however, vetoed the bill because it prohibited only those offenses already covered by the 1918 Act, while reducing the penalties.[11] This was hardly the measure needed to increase the protection of federal agencies from the variety of deceptive practices plaguing the New Deal administration.

To remedy the President's concerns, Congress quickly passed a second bill that broadened the scope of the federal false-statements statute by omitting the specific-intent language of the prior bill. The 1934 provision finally enacted into law provided in pertinent part:

> "[W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make . . . any false or fraudulent statements or representations, . . . in any matter within the juris-

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[10] The Senate initially had proposed a similar bill (S. 2686), but that bill omitted the essential element of specific intent to defraud the United States. The Senate bill provided in relevant part:

> "[E]very person who knowingly or willfully makes . . . any false or fraudulent . . . writing . . . pertaining to any . . . matter within the jurisdiction of any department or agency of the Federal Government . . . shall be punished . . . ." 78 Cong. Rec., at 2858–2859.

The Senate later withdrew its bill in favor of H. R. 8046, and the latter was passed by both Houses of Congress. *Id.*, at 5746.

[11] The President's veto message read in part as follows:

> "This bill [H. R. 8046], in effect, seeks to punish every person who, with intent to defraud the United States, knowingly or willfully makes . . . any false representation concerning any matter within the jurisdiction of any agency of the United States . . . .
>
> "These offenses are already covered by existing law, which provides for more severe punishment than that proposed by the bill. [The 1918 Act] . . . provides for the punishment of all persons who, for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States . . . knowingly and willfully . . . make[s] . . . any false or fraudulent statement or representation . . . .
>
> "The bill is objectionable in that its result would be to reduce the punishment for certain frauds against the United States." *Id.*, at 6778–6779.

> diction of any department or agency of the United States . . . shall be fined . . . ." Act of June 18, 1934, ch. 587, 48 Stat. 996.

Noticeably lacking from this enactment is any requirement that the prohibited conduct be undertaken with specific intent *to deceive* the Federal Government, or with *actual knowledge* that false statements were made in a matter within federal agency jurisdiction. If Congress had intended to impose either requirement, it would have modified the prior bill by replacing the phrase "with intent to defraud the United States" with the phrase "with intent to deceive the United States,"[12] or by inserting the phrase "knowing such statements to be in any matter within the jurisdiction of any federal agency." That Congress did not include such language, either in the 1934 enactment or in the 1948 revision, provides convincing evidence that the statute does not require actual knowledge of federal involvement.[13]

Finally, there is no support in the legislative history for respondent's argument that the terms "knowingly and willfully" modify the phrase "in any matter within the jurisdiction of [a federal agency]." The terms "knowingly and willfully" appeared in the 1918 Act, but the phrase "in any matter within the jurisdiction of [a federal agency]" did not. It is clear, therefore, that in the 1918 Act the terms "knowingly and willfully" did not require proof of actual knowledge of federal involvement. Nor does the legislative history suggest that by adding the jurisdictional prerequisite to the current provision Congress intended to extend the scope of those two terms. The jurisdictional language was added to the current provision solely to limit the reach of the false-statements statute to matters of federal interest.

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[12] See *United States* v. *Godwin*, 566 F. 2d 975, 976 (CA5 1978) ("Intent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive of some right, interest or property by deceit"). Accord, *United States* v. *Lichenstein*, 610 F. 2d 1272 (CA5), cert. denied, 447 U. S. 907 (1980).

[13] The dissent suggests that when Congress eliminated the phrase "with intent to defraud the United States," it really meant only to eliminate the word "defraud," but to retain the element of intent with respect to the United States. See *post*, at 81–82. If that had been the intention of Congress, it simply would have replaced the word "defraud" with the word "deceive" and retained the express-intent requirement. Congress did not do so, and this Court should not rewrite the statute in a way that Congress did not intend.

By requiring proof of specific intent to defraud the United States, Congress limited the 1918 prohibition to matters pertaining to federal concern. There was no reason, therefore, to include the phrase "in any matter within the jurisdiction of [a federal agency]." Once the specific-intent language of the 1918 Act was eliminated, however, the current jurisdictional phrase was necessary to ensure that application of the federal prohibition remained limited to issues of federal concern. There is no indication that the addition of this phrase was intended also to change the meaning of the terms "knowingly and willfully" to require proof of actual knowledge of federal involvement. As this Court observed in *United States* v. *Bramblett*, 348 U. S. 503 (1955), the 1934 enactment "deleted all words as to purpose," and inserted the phrase "in any matter within the jurisdiction" of a federal agency "simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached." *Id.*, at 506, 507–508.

## III

Respondent argues that absent proof of actual knowledge of federal agency jurisdiction, § 1001 becomes a "trap for the unwary," imposing criminal sanctions on "wholly innocent conduct." Whether or not respondent fairly may characterize the intentional and deliberate lies prohibited by the statute (and manifest in this case) as "wholly innocent conduct," this argument is not sufficient to overcome the express statutory language of § 1001. Respondent does not argue that Congress lacks the power to impose criminal sanctions for deliberately false statements submitted to a federal agency, regardless of whether the person who made such statements actually knew that they were being submitted to the Federal Government. Cf. *Feola*, 420 U. S., at 676, n. 9. That is precisely what Congress has done here. In the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this Court to amend the criminal statute.[14]

## IV

Both the plain language and the legislative history establish that proof of actual knowledge of federal agency jurisdiction is not required under § 1001. Accordingly, we reverse the decision of the Court of Appeals to the contrary.

*It is so ordered.*

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

It is common ground that in a prosecution for the making of false statements the Government must prove that the defendant actually knew that the statements were false at the time he made them. See *Bryson* v. *United States*, 396 U. S. 64, 68–70 (1969). The question presented here is whether the Government must also prove that the defendant actually knew that his statements were made in a matter within "the jurisdiction of any department or agency of the United States." The Court concludes that the plain language and the legislative history of 18 U. S. C. § 1001 conclusively establish that the statute is intended to reach false statements made without actual knowledge of federal involvement in the subject matter of the false statements. I cannot agree.

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[14] In the context of this case, respondent's argument that § 1001 is a "trap for the unwary" is particularly misplaced. It is worth noting that the jury was instructed, without objection from the prosecution, that the Government must prove that respondent "knew or should have known" that his false statements were made within the jurisdiction of a federal agency.

As the Government did not object to the reasonable-foreseeability instruction, it is unnecessary for us to decide whether that instruction erroneously read a culpability requirement into the jurisdictional phrase. Moreover, the only question presented in this case is whether the Government must prove that the false statement was made with *actual* knowledge of federal agency jurisdiction. The jury's finding that federal agency jurisdiction was reasonably foreseeable by the defendant, combined with the requirement that the defendant had actual knowledge of the falsity of those statements, precludes the possibility that criminal penalties were imposed on the basis of innocent conduct.

The Court nonetheless proceeds on the assumption that *some* lesser culpability standard is required in § 1001 prosecutions, but declines to decide what that lesser standard is. Even if I agreed with the Court that actual knowledge of federal involvement is not required here, I could not agree with the Court's disposition of this case because it reverses the Court of Appeals without determining for itself, or remanding for the lower court to determine, whether the jury instructions in respondent's case were proper. I think that our certiorari jurisdiction is best exercised to resolve conflicts in statutory construction, and not simply to decide whether a jury in a particular case was correctly charged as to the elements of the offense. But here the Court, in a remarkable display of left-footedness, accomplishes neither result: reading its opinion from beginning to end, one neither knows what the congressionally intended element of intent is, nor whether the jury was properly instructed in this case.

## I

I think that in this case, "[a]fter 'seiz[ing] every thing from which aid can be derived,' *United States* v. *Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C. J.), we are left with an ambiguous statute." *United States* v. *Bass*, 404 U. S. 336, 347 (1971). Notwithstanding the majority's repeated, but sparsely supported, assertions that the evidence of Congress' intent not to require actual knowledge is "convincing," and "unambiguou[s]," *ante*, at 69, and n. 7, 73, I believe that the language and legislative history of § 1001 can provide "no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U. S. 169, 178 (1958). I therefore think that the canon of statutory construction which requires that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity," *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), is applicable here. Accordingly, I would affirm the Court of Appeals' conclusion that actual knowledge of federal involvement is a necessary element for conviction under § 1001.

The federal false-statements statute, 18 U. S. C. § 1001, provides that

> "[w]hoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both" (emphasis added).

The majority correctly begins its analysis with the language of the statute, see *United States* v. *Turkette*, 452 U. S. 576, 580 (1981), but in my view, it incorrectly concludes that the statutory language is unambiguous.

In drawing that conclusion, the Court does no more than point out that the "in any matter" language is placed at the beginning of the sentence in a phrase separate from the later phrase specifying the prohibited conduct. The Court then concludes that under any "natural reading" of the statute, it is clear that "knowingly and willfully" modify only the phrase specifying the prohibited conduct. *Ante*, at 69–70. Although "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language" in a statute, *United States* v. *Turkette, supra*, at 580, the Court's reasoning here amounts to little more than simply pointing to the ambiguous phrases and proclaiming them clear. In my view, it is quite impossible to tell which phrases the terms "knowingly and willfully" modify, and the magic wand of *ipse dixit* does nothing to resolve that ambiguity. I agree with the Court of Appeals that

> "neither the grammatical construction nor the punctuation of the statute indicates whether the 'knowingly and willfully' phrase modifies only the phrase 'makes any false, fictitious or fraudulent statements' *or* the broader phrase 'in any matter within the jurisdiction of any department or agency of the United States . . . makes any false, fictitious or fraudulent statements.'" 708 F. 2d 365, 368 (CA9 1983) (emphasis in original).

Nor does the fact that the "in any matter" language appears as an introductory phrase at the beginning of the statute support the Court's conclusion that Congress did not intend that phrase to be modified by the culpability language. This is so because, before the 1948 revision of the statute—a housekeeping overhaul intended to make no substantive changes, *United States* v. *Bramblett*, 348 U. S. 503, 508 (1955)—the "in any matter" language in fact did *not* appear as an introductory phrase in the statute. Before the 1948 revision, the 1934 statute read as follows:

> "[W]hoever shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations, . . . *in any matter within the jurisdiction of any department or agency of the United States* . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." Act of June 18, 1934, ch. 587, 48 Stat. 996 (emphasis added).

Turning its attention, as it must, to that version of the statute, the Court again does no more than proclaim that the most "natural reading," even of the 1934 statute, with the "in any matter" language at the end rather than at the beginning of the statute, is that "knowingly and willfully" modify only the making of false statements. *Ante*, at 69, n. 6. But the fact that the Court's "natural reading" has not seemed so natural to the judges of the Ninth and Fifth Circuits, nor for that matter to me, indicates that the Court's reading, though certainly a plausible one, is not at all compelled by the statutory language. See 2A C. Sands, Sutherland on Statutory Construction § 46.04 (4th ed. 1973 and 1984 Cum. Supp.).

The legislative history is similarly unclear, but in my view, slightly more supportive of respondent's position than of the Court's position. It is in any event certainly not the kind of clear expression of legislative intent which is sufficient to explain an otherwise ambiguous statute and to overcome the application of the rule of lenity.

As the Court points out, the 1918 Act was the first federal prohibition on the making of false statements, and that Act included language requiring that the prohibited false statements be made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof." Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. All agree that that quoted language directly supports the Court of Appeals' holding here, Brief for United States 10, and the Court rests its entire holding on the absence of that language in the current statute. *Ante*, at 71–74.

Examination of the evolution of the statute, however, reveals only meager support for the Court's conclusion that Congress made "a conscious choice," *ante*, at 71, to eliminate the requirement of actual knowledge of federal involvement when it deleted the quoted language. To me, the change in the statutory language is as readily explained by Congress' desire to eliminate, *not* the intent requirement, but rather the "cheating and swindling or defrauding" language—language which this Court in *United States* v. *Cohn*, 270 U. S. 339, 346–347 (1926), had relied on in construing the 1918 Act narrowly to apply only to "the fraudulent causing of pecuniary or property loss" to the Federal Government.

In *Cohn* the Court expressly rejected the Government's argument that Congress intended the 1918 Act to go beyond merely protecting the Government from being cheated out of its own money or property, and in addition intended it to protect the Government from the interference with and obstruction of any of its lawful functions by deceitful or fraudulent means. *Ibid.* The Court specifically focused on the use of the word "defraud" in the statute and concluded that even when used in connection with the words "cheating and swindling," the word "defraud" is only to be given its ordinary meaning of "fraudulent[ly] causing . . . pecuniary or property loss." *Ibid.*

The restricted scope of the 1918 Act resulting from the *Cohn* decision became a serious problem with the advent of the New Deal programs in the 1930's. Early in 1934 Secretary of the Interior Ickes contacted the Chairmen of the House and Senate Judiciary Committees and proposed a false-statements bill, intended to be broader than the 1918 Act, that would fill a gap he perceived in the present Criminal Code. See H. R. Rep. No. 829, 73d Cong., 2d Sess., 1–2 (1934); 78 Cong. Rec. 2858–2859 (1934). In particular the Secretary was concerned that there were at present no statutes outlawing, for example, the presentation of false documents and statements to the Department of the Interior in connection with the shipment of "hot oil," or to the Public Works Administration in connection with the transaction of business with that agency. See S. Rep. No. 1202, 73d Cong., 2d Sess., 1 (1934).

To address the Secretary's concerns, both the House and the Senate tried their hands at drafting a bill penalizing the making of false statements in connection with areas of federal agency concern. The House version, H. R. 8046, which was the version finally passed, provided:

> "[E]very person who *with intent to defraud the United States* knowingly or willfully makes . . . any false . . . statement, . . . concerning or pertaining to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commis-

> sion of the United States . . . shall be punished by a fine not exceeding $5,000 or by imprisonment for a term of not more than 5 years, or by both such fine and imprisonment." 78 Cong. Rec. 3724 (1934) (emphasis added).

The language of the bill and the House Report accompanying the bill made clear that H. R. 8046 required proof that the defendant actually knew that his fraudulent statements were directed at the Federal Government. The House Report explicitly noted that the "rights of the accused are protected by the provision that the act must be committed willfully and knowingly *and with intent to defraud the United States.*" H. R. Rep. No. 829, 73d Cong., 2d Sess., 2 (1934) (emphasis added). Statements made on the floor of both Houses during consideration of the bills indicate that the legislators understood that the purpose of the legislation was to deter those individuals "hovering over every department of the Government like obscene harpies, like foul buzzards" intending to deceive the Federal Government. 78 Cong. Rec. 2858 (1934); see *id.*, at 3724.

In spite of the noble goals and colorful metaphors that H. R. 8046 carried with it, President Roosevelt vetoed the bill for what seems now to be a rather obvious reason. In his veto message President Roosevelt pointed out that the statute as drafted was superfluous—it prohibited the very same conduct that was already prohibited by the 1918 Act and it even specified lesser penalties for that conduct. *Id.*, at 6778–6779. Indeed in comparing the bill with the 1918 Act, it is all too obvious that when Congress made the prohibition depend on an intent to *defraud*, it subjected the new statute to the same narrowing construction that the Court had given to the 1918 Act in *Cohn*—the very construction that had created the need for the new Act. Thus, to eliminate the President's problems with the bill, Congress simply enhanced the penalties provision and omitted the limiting language. That language, of course, was the "intent to *defraud* the United States" language. Another bill, H. R.

8912, was then passed by both Houses, 78 Cong. Rec. 12452 (1934), and, for purposes of this case, the statute assumed its present form, except for the phraseology changes made in the 1948 revision previously discussed.

Of course the Court is correct that Congress could have made its intent clearer by rewriting the limiting language so as to require an "intent to deceive" rather than an "intent to defraud" the Federal Government. See *ante*, at 73, and n. 13. But the fact still remains that nowhere in the admittedly sparse legislative history is there any indication that Congress intended the postveto changes to alter the culpability requirement that had been a part of the Act since 1918. Indeed in *United States* v. *Gilliland*, 312 U. S. 86, 94 (1941), we pointed out that the purpose of the amendment simply was to "omi[t] the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been caused" (footnote omitted). It seems to me highly unlikely that, without so much as a hint of explanation, Congress would have changed the statute from one intended to deter the perpetration of deliberate deceit on the Federal Government, to one intended to criminalize the making of even the most casual false statements so long as they turned out, unbeknownst to their maker, to be material to some federal agency function. The latter interpretation would substantially extend the scope of the statute even to reach, for example, false statements privately made to a neighbor if the neighbor then uses those statements in connection with his work for a federal agency.

Of course "[i]t is not unprecedented for Congress to enact [such] stringent legislation," *United States* v. *Feola*, 420 U. S. 671, 709 (1975) (Stewart, J., dissenting). But I cannot subscribe to the Court's interpretation of this statute in such a way as to "make a surprisingly broad range of unremarkable conduct a violation of federal law," *Williams* v. *United States*, 458 U. S. 279, 286 (1982), when the legislative history simply "fails to evidence congressional awareness of the statute's claimed scope." *Id.*, at 290. Thus, I would hold that the rule of lenity is applicable in this case and that it requires the Government to prove that a defendant in a § 1001 prosecution had actual knowledge that his false statements were made in a matter within federal agency jurisdiction.

## II

Seemingly aware of the broad range of conduct that § 1001 could sweep within its scope under today's interpretation, the Court apparently does not hold that the words "in any matter within the jurisdiction of any department or agency of the United States" are jurisdictional words *only* and that *no* state of mind is required with respect to federal agency involvement. *Ante*, at 68–69, and n. 5. Instead, the Court suggests that some lesser state of mind may well be required in § 1001 prosecutions in order to prevent the statute from becoming a "trap for the unwary." *Ante*, at 75, n. 14. Accordingly, it expressly declines to decide whether the trial judge erred in its jury instructions in this case. *Ibid.*

In my view, the Court has simply disregarded the clearest, albeit not conclusive, evidence of legislative intent and then has invited lower courts to improvise a new state-of-mind requirement, almost out of thin air, in order to avoid the unfairness of the Court's decision today. I think that the Court's opinion will engender more confusion than it will resolve with respect to the culpability requirement in § 1001 cases not before the Court. And, unfortunately, it tells us absolutely nothing about whether respondent Yermian received a proper jury instruction in the case that *is* before the Court.

If the proper standard is something other than "actual knowledge" or "reasonable foreseeability," then respondent is entitled to a new trial and a proper instruction under that standard. The Court seems to believe that the question of the proper culpability requirement is not before it, *ante*, at 68, n. 5, 75, n. 14, because it apparently concludes that that question is not embraced in the Governments' petition for certiorari asking for review of the Court of Appeals' holding with respect to the actual knowledge standard. See Pet. for Cert. I. Apparently the Court believes that respondent should have filed a cross-petition for certiorari if he wished to raise the issue of the proper standard and the propriety of the jury instructions in his case. But it is an elementary proposition that a "cross-petition is not necessary to enable a party to advance any ground, even one rejected or not raised below, in support of the judgment in his favor." R. Stern & E. Gressman, Supreme Court Practice 478 (5th ed. 1978); see *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419 (1977). Here, respondent's alternative argument for a "recklessness" standard, if accepted, mandates affirmance of the Court of Appeals' judgment below that he is entitled to a new trial. If the Court is unwilling to decide the issue itself, I believe that at a minimum it must remand for a decision on the issue, see *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970) (dictum), rather than simply leaving the propriety of respondent's conviction in a state of limbo.

I respectfully dissent.

Syllabus

# NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83–271. Argued March 20, 1984—Decided June 27, 1984

In 1981, petitioner National Collegiate Athletic Association (NCAA) adopted a plan for the televising of college football games of its member institutions for the 1982-1985 seasons. The plan recites that it is intended to reduce the adverse effect of live television upon football game attendance. The plan limits the total amount of televised intercollegiate football games and the number of games that any one college may televise, and no member of the NCAA is permitted to make any sale of television rights except in accordance with the plan. The NCAA has separate agreements with the two carrying networks, the American Broadcasting Cos. and the Columbia Broadcasting System, granting each network the right to telecast the live "exposures" described in the plan. Each network agreed to pay a specified "minimum aggregate compensation" to the participating NCAA members, and was authorized to negotiate directly with the members for the right to televise their games. Respondent Universities, in addition to being NCAA members, are members of the College Football Association (CFA), which was originally organized to promote the interests of major football-playing colleges within the NCAA structure, but whose members eventually claimed that they should have a greater voice in the formulation of football television policy than they had in the NCAA. The CFA accordingly negotiated a contract with the National Broadcasting Co. that would have allowed a more liberal number of television appearances for each college and would have increased the revenues realized by CFA members. In response, the NCAA announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. Respondents then commenced an action in Federal District Court, which, after an extended trial, held that the controls exercised by the NCAA over the televising of college football games violated § 1 of the Sherman Act, and accordingly granted injunctive relief. The court found that competition in the relevant market—defined as "live college football television"—had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. The Court of Appeals agreed that the Sherman Act had been violated, holding that the NCAA's television plan constituted illegal *per se* price fixing and that even if it were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justifications sufficient to save the plan even when the totality of the circumstances was examined.

*Held:* The NCAA's television plan violates § 1 of the Sherman Act. Pp. 98–120.

(a) While the plan constitutes horizontal price fixing and output limitation, restraints that ordinarily would be held "illegal *per se*," it would be inappropriate to apply a *per se* rule in this case where it involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. The NCAA and its members market competition itself—contests between competing institutions. Thus, despite the fact that restraints on the ability of NCAA members to compete in terms of price and output are involved, a fair evaluation of their competitive character requires consideration, under the Rule of Reason, of the NCAA's justifications for the restraints. But an analysis under the Rule of Reason does not change the ultimate focus of the inquiry, which is whether or not the challenged restraints enhance competition. Pp. 98–104.

(b) The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the District Court's findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon the NCAA a heavy burden of establishing an affirmative defense that competitively justifies this apparent deviation from the operations of a free market. The NCAA's argument that its television plan can have no significant anticompetitive effect since it has no market power must be rejected. As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output and, as a factual matter, it is evident from the record that the NCAA does possess market power. Pp. 104–113.

(c) The record does not support the NCAA's proffered justification for its television plan that it constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. The District Court's contrary findings undermine such a justification. Pp. 113–115.

(d) Nor, contrary to the NCAA's assertion, does the television plan protect live attendance, since, under the plan, games are televised during all hours that college football games are played. Moreover, by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to draw live attendance when faced with competition from televised games, the NCAA forwards a justification that is inconsistent with the Sherman Act's basic policy. "The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 696. Pp. 115–117.

(e) The interest in maintaining a competitive balance among amateur athletic teams that the NCAA asserts as a further justification for its television plan is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues, but simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that such restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. Moreover, the District Court's well-supported finding that many more games would be televised in a free market than under the NCAA plan, is a compelling demonstration that the plan's controls do not serve any legitimate procompetitive purpose. Pp. 117–120.

707 F. 2d 1147, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 120.

*Frank H. Easterbrook* argued the cause for petitioner. With him on the briefs were *George H. Gangwere* and *James D. Fellers*.

*Andy Coats* argued the cause for respondents. With him on the brief were *Clyde A. Muchmore*, *Erwin N. Griswold*, *J. Ralph Beaird*, and *James F. Ponsoldt*.

*Solicitor General Lee* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General McGrath*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney Gen-*

*eral Ginsberg, Jerrold J. Ganzfried, Barry Grossman,* and *Andrea Limmer.**

JUSTICE STEVENS delivered the opinion of the Court.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act[1] and granted injunctive relief. 546 F. Supp. 1276 (WD Okla. 1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. 707 F. 2d 1147 (CA10 1983). We granted certiorari, 464 U. S. 913 (1983), and now affirm.

## I

### *The NCAA*

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. In some sports, such as baseball, swimming, basketball, wrestling, and track, it has sponsored and conducted national tournaments. It has not done so in the sport of football, however. With the exception of football, the NCAA has not undertaken any regulation of the televising of athletic events.[2]

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**Gerald A. Caplan* and *Alexander Halpern* filed a brief for the National Federation of State High School Associations as *amicus curiae* urging reversal.

*Forrest A. Hainline III* and *J. Laurent Scharff* filed a brief for the Association of Independent Television Stations, Inc., as *amicus curiae* urging affirmance.

[1] Section 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1.

The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group only 187 play intercollegiate football. Divisions II and III include approximately 500 colleges with less extensive athletic programs. Division I has been subdivided into Divisions I-A and I-AA for football.

Some years ago, five major conferences together with major football-playing independent institutions organized the College Football Association (CFA). The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

### *History of the NCAA Television Plan*

In 1938, the University of Pennsylvania televised one of its home games.[3] From 1940 through the 1950 season all of Pennsylvania's home games were televised. App. 303. That was the beginning of the relationship between television and college football.

On January 11, 1951, a three-person "Television Committee," appointed during the preceding year, delivered a report to the NCAA's annual convention in Dallas. Based on preliminary surveys, the committee had concluded that "television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical system." *Id.*, at 265. The report emphasized that "the television problem is truly a national one and requires collective action by the colleges." *Id.*, at 270. As a result, the NCAA decided to retain the National Opinion Research Center (NORC) to study the impact of television on live attendance, and to declare a moratorium on the televising of football games. A television committee was appointed to implement the decision and to develop an NCAA television plan for 1951. *Id.*, at 277–278.

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[2] Presumably, however, it sells the television rights to events that the NCAA itself conducts.

[3] According to the NCAA football television committee's 1981 briefing book: "As far as is known, there were [then] six television sets in Philadelphia; and all were tuned to the game." App. 244.

The committee's 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season. A team could appear on television only twice during a season. The plan also provided that the NORC would conduct a systematic study of the effects of the program on attendance. *Id.*, at 279. The plan received the virtually unanimous support of the NCAA membership; only the University of Pennsylvania challenged it. Pennsylvania announced that it would televise all its home games. The council of the NCAA thereafter declared Pennsylvania a member in bad standing and the four institutions scheduled to play at Pennsylvania in 1951 refused to do so. Pennsylvania then reconsidered its decision and abided by the NCAA plan. *Id.*, at 280–281.

During each of the succeeding five seasons, studies were made which tended to indicate that television had an adverse effect on attendance at college football games. During those years the NCAA continued to exercise complete control over the number of games that could be televised. *Id.*, at 325–359.

From 1952 through 1977 the NCAA television committee followed essentially the same procedure for developing its television plans. It would first circulate a questionnaire to the membership and then use the responses as a basis for formulating a plan for the ensuing season. The plan was then submitted to a vote by means of a mail referendum. Once approved, the plan formed the basis for NCAA's negotiations with the networks. Throughout this period the plans retained the essential purposes of the original plan. See 546 F. Supp., at 1283.[4] Until 1977 the contracts were all for either 1- or 2-year terms. In 1977 the NCAA adopted "principles of negotiation" for the future and discontinued the practice of submitting each plan for membership approval. Then the NCAA also entered into its first 4-year contract granting exclusive rights to the American Broadcasting Cos. (ABC) for the 1978–1981 seasons. ABC had held the exclusive rights to network telecasts of NCAA football games since 1965. *Id.*, at 1283–1284.

*The Current Plan*

The plan adopted in 1981 for the 1982–1985 seasons is at issue in this case.[5] This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance.[6] It provides that "all forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." App. 35. The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." *Id.*, at 36. In addition to the principal award of rights to the carrying networks, the plan also describes rights for a "supplementary series" that had been awarded for the 1982 and 1983 seasons,[7] as well as a procedure for permitting specific "exception telecasts."[8]

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[4] The television committee's 1981 briefing book elaborates:

"In 1952, the NCAA Television Committee initiated a plan for controlling the televising of college football games. The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:

"1. To reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;

"2. To spread television among as many NCAA member colleges as possible; and

"3. To provide football television to the public to the extent compatible with the other two objectives." *Ibid.*

[5] Because respondents sought and obtained only injunctive relief against future violations of § 1 in the District Court, we do not consider previous NCAA television plans except to the extent that they shed light on the purpose and effect of the current plan.

[6] "The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among

In separate agreements with each of the carrying networks, ABC and the Columbia Broadcasting System (CBS), the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set forth therein.[9] Each of the networks agreed to pay a specified "minimum aggregate compensation

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as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." *Id.*, at 35 (parenthetical omitted).

[7] The supplementary series is described in a separate article of the plan. It is to consist of no more than 36 exposures in each of the first two years and no more than 40 exposures in the third and fourth years of the plan. Those exposures are to be scheduled on Saturday evenings or at other times that do not conflict with the principal football series that is scheduled for Saturday afternoons. *Id.*, at 86–92.

[8] An "exception" telecast is permitted in the home team's market of games that are sold out, and in the visiting team's market of games played more than 400 miles from the visiting team's campus, but in both cases only if the broadcast would not be shown in an area where another college football game is to be played. *Id.*, at 62–72. Also, Division II and Division III institutions are allowed complete freedom to televise their games, except that the games may not appear on a network of more than five stations without the permission of the NCAA. *Id.*, at 73–74.

[9] In addition to its contracts with the carrying networks, the NCAA has contracted with Turner Broadcasting System, Inc. (TBS), for the exclusive right to cablecast NCAA football games. The minimum aggregate fee for the initial 2-year period of the TBS contract is $17,696,000. 546 F. Supp., at 1291–1292.

to the participating NCAA member institutions" during the 4-year period in an amount that totaled $131,750,000. In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years and that the District Court found would be followed under the current agreement involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price.[10] The aggregate of all these payments presumably equals the total minimum aggregate compensation set forth in the basic agreement. Except for differences in payment between national and regional telecasts, and with respect to Division II and Division III games, the amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved. See 546 F. Supp., at 1289–1293.[11]

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[10] The football television committee's briefing book for 1981 recites that a fee of $600,000 was paid for each of the 12 national games telecast by ABC during the regular fall season and $426,779 was paid for each of the 46 regional telecasts in 1980. App. 250. The report further recites: "Division I members received $27,842,185 from 1980 football television revenue, 89.8 percent of the total. Division II's share was $625,195 (2.0 percent), while Division III received $385,195 (1.3 percent) and the NCAA $2,147,425 (6.9 percent)." *Id.*, at 251.

[11] The District Court explained how the agreement eliminates competition for broadcasting rights:

"First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and

The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2-year periods that the plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. See *id.*, at 1293. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan.

### *Background of this Controversy*

Beginning in 1979 CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they had in the NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, devel-

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agreed to a rights fee for that game with the two teams involved, the other network is then in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date because, again, they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan." 546 F. Supp., at 1292–1293.

oped an independent plan, and obtained a contract offer from the National Broadcasting Co. (NBC). This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members. See *id.*, at 1286.

In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well. On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the theatened sanctions and therefore the agreement was never consummated. See *id.*, at 1286–1287.

### *Decision of the District Court*

After a full trial, the District Court held that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act. The District Court defined the relevant market as "live college football television" because it found that alternative programming has a significantly different and lesser audience appeal. *Id.*, at 1297–1300.[12] The District Court then concluded that the NCAA controls over college football are those of a "classic cartel" with an

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[12] The District Court held that the NCAA had monopolized the relevant market in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. See 546 F. Supp., at 1319–1323. The Court of Appeals found it unnecessary to reach this issue, as do we.

> "almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products." *Id.*, at 1300–1301.

The District Court found that competition in the relevant market had been restrained in three ways: (1) NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its own members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. *Id.*, at 1293–1295.

In the District Court the NCAA offered two principal justifications for its television policies: that they protected the gate attendance of its members and that they tended to preserve a competitive balance among the football programs of the various schools. The District Court rejected the first justification because the evidence did not support the claim that college football television adversely affected gate attendance. *Id.*, at 1295–1296. With respect to the "competitive balance" argument, the District Court found that the evidence failed to show that the NCAA regulations on matters such as recruitment and the standards for preserving amateurism were not sufficient to maintain an appropriate balance. *Id.*, at 1296.

*Decision of the Court of Appeals*

The Court of Appeals held that the NCAA television plan constituted illegal *per se* price fixing, 707 F. 2d, at 1152.[13] It rejected each of the three arguments advanced by NCAA to establish the procompetitive character of its plan.[14] First, the court rejected the argument that the television plan promoted live attendance, noting that since the plan involved a concomitant reduction in viewership the plan did not result in a net increase in output and hence was not procompetitive. *Id.*, at 1153–1154. Second, the Court of Appeals rejected as illegitimate the NCAA's purpose of promoting athletically balanced competition. It held that such a consideration amounted to an argument that "competition will destroy the market"—a position inconsistent with the policy of the Sherman Act. Moreover, assuming *arguendo* that the justification was legitimate, the court agreed with the District Court's finding "that any contribution the plan made to athletic balance could be achieved by less restrictive means." *Id.*, at 1154. Third, the Court of Appeals refused to view the NCAA plan as competitively justified by the need to compete effectively with other types of television programming, since it entirely eliminated competition between producers of football and hence was illegal *per se*. *Id.*, at 1155–1156.

Finally, the Court of Appeals concluded that even if the television plan were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined. *Id.*, at 1157–1160.[15] The case was remanded to the District Court for an appropriate modification in its injunctive decree. *Id.*, at 1162.[16]

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[13] The Court of Appeals rejected the District Court's boycott holding, since all broadcasters were free to negotiate for a contract as carrying networks and the threat of sanctions against members for violating NCAA rules could not be considered a boycott if the rules were otherwise valid. 707 F. 2d, at 1160–1161.

[14] In the Court of Appeals as well as the District Court, petitioner argued that respondents had suffered no injury of the type the antitrust laws were designed to prevent, relying on *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). Both courts rejected its position, 707 F. 2d, at 1150–1152; 546 F. Supp., at 1303–1304. Petitioner does not seek review on that question in this Court. Brief for Petitioner 5, n. 1.

## II

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.[17]

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[15] The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals. See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982). In any event, petitioner does not now ask us to set aside any of the findings of the District Court, but rather argues only that both the District Court and the Court of Appeals erred as a matter of law. Brief for Petitioner 6, n. 2, 18–19.

[16] Judge Barrett dissented on the ground that the NCAA television plan's primary purpose was not anticompetitive. "Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors." 707 F. 2d, at 1163. He regarded the television restraints as fully justified "in that they are necessary to maintain intercollegiate football as amateur competition." *Id.*, at 1165. He added: "The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement." *Id.*, at 1167.

[17] See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 342–343 (1982); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–688 (1978); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.[18] A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.[19] Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.[20]

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[18] See *Arizona* v. *Maricopa County Medical Society*, 457 U. S., at 356–357; *National Society of Professional Engineers* v. *United States*, 435 U. S., at 694–696; *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 608–611 (1972). See also *United States* v. *Sealy, Inc.*, 388 U. S. 350, 352–354 (1967) (marketing association controlled by competing distributors is a horizontal combination). See generally Blecher & Daniels, Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act, 4 Whittier L. Rev. 217 (1982).

[19] See, *e. g.*, *United States* v. *Topco Associates, Inc.*, 405 U. S., at 608–609; *United States* v. *Sealy, Inc.*, *supra; United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 388–390 (1923); *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 410–412 (1921).

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 19–20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement,[21] on the fact that the NCAA is organized as a nonprofit entity,[22] or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics.[23] Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

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[20] See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S., at 344–348; *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 646–647 (1980) *(per curiam)*; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 213 (1951); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 212–214 (1940); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 396–398 (1927).

[21] While judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules, see *Broadcast Music*, 441 U. S., at 9–10; *United States* v. *Topco Associates, Inc.*, 405 U. S., at 607–608; *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963), the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry. See *Arizona* v. *Maricopa County Medical Society*, 457 U. S., at 349–351; *National Society of Professional Engineers* v. *United States*, 435 U. S, at 689–690.

[22] There is no doubt that the sweeping language of § 1 applies to nonprofit entities, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 786–787 (1975), and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct, *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556, 576 (1982). Moreover, the economic significance of the NCAA's nonprofit character is questionable at best. Since the District Court found that the NCAA and its member institutions are in fact organized to maximize reve-

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates

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nues, see 546 F. Supp., at 1288–1289, it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity. Petitioner does not rely on its nonprofit character as a basis for reversal. Tr. of Oral Arg. 24.

[23] While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice. See *United States* v. *Griffith*, 334 U. S. 100, 105–106 (1948); *Associated Press* v. *United States*, 326 U. S. 1, 16, n. 15 (1945); *Chicago Board of Trade* v. *United States*, 246 U. S., at 238; *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20, 49 (1912); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 342 (1897).

college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.[24]

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[24] See *Justice* v. *NCAA*, 577 F. Supp. 356, 379–383 (Ariz. 1983); *Jones* v. *NCAA*, 392 F. Supp. 295, 304 (Mass. 1975); *College Athletic Placement Service, Inc.* v. *NCAA*, 1975–1 Trade Cases ¶ 60,117 (NJ), aff'd mem., 506 F. 2d 1050 (CA3 1974). See also *Brenner* v. *World Boxing Council*, 675 F. 2d 445, 454–455 (CA2 1982); *Neeld* v. *National Hockey League*, 594 F. 2d 1297, 1299, n. 4 (CA9 1979); *Smith* v. *Pro Football, Inc.*, 193 U. S. App. D. C. 19, 26–27, 593 F. 2d 1173, 1180–1181 (1978); *Hatley* v. *American Quarter Horse Assn.*, 552 F. 2d 646, 652–654 (CA5 1977); *Mackey* v. *National Football League*, 543 F. 2d 606, 619 (CA8 1976), cert. dism'd, 434 U. S. 801 (1977); *Bridge Corp. of America* v. *The American Contract Bridge League, Inc.*, 428 F. 2d 1365, 1370 (CA9 1970), cert. denied, 401 U. S. 940 (1971); *Gunter Harz Sports, Inc.* v. *United States Tennis Assn.*, 511 F. Supp. 1103, 1116 (Neb.), aff'd, 665 F. 2d 222 (CA8 1981); *Cooney* v. *American Horse Shows Assn., Inc.*, 495 F. Supp. 424, 430 (SDNY 1980); *Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 468 F. Supp. 154, 165–166 (CD Cal. 1979), preliminary injunction entered, 484 F. Supp. 1274 (1980), rev'd on other grounds, 634 F. 2d 1197 (CA9 1980); *Kupec* v. *Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (MDNC 1975); Closius, Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry, 24 Boston College L. Rev. 341, 344–345 (1983); Kurlantzick, Thoughts on Professional Sports and the Antitrust Law: *Los Angeles Memorial Coliseum v. National Football League*, 15 Conn. L. Rev. 183, 189–194 (1983); Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802, 817–818 (1981). See generally *Hennessey*

*Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. See 441 U. S., at 18–23. Similarly, as we indicated in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51–57 (1977), a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978). A conclusion that a restraint of trade is unreasonable may be

> "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions." *Id.*, at 690 (footnotes omitted).

*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to

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v. *NCAA*, 564 F. 2d 1136, 1151–1154 (CA5 1977); *Association for Intercollegiate Athletics for Women* v. *NCAA*, 558 F. Supp. 487, 494–495 (DC 1983); *Warner Amex Cable Communications, Inc.* v. *American Broadcasting Cos.*, 499 F. Supp. 537, 545–546 (SD Ohio 1980); *Board of Regents* v. *NCAA*, 561 P. 2d 499, 506–507 (Okla. 1977); Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 665–666, 673–675 (1978).

render unjustified further examination of the challenged conduct.[25] But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.[26] Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.[27]

## III

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects.[28] The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.[29] Moreover, the

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[25] See *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 15–16, n. 25 (1984); *Arizona* v. *Maricopa County Medical Society*, 457 U. S., at 350–351; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977).

[26] Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "*per se*" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis. See *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 11–12.

[27] "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the Several States.'" *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4–5 (1958).

[28] In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. See 15 U. S. C. §§ 1291–1295. The

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legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States* v. *National Football League*, 116 F. Supp. 319 (ED Pa. 1953), which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated § 1 of the Sherman Act. See S. Rep. No. 1087, 87th Cong., 1st Sess. (1961); H. R. Rep. No. 1178, 87th Cong., 1st Sess., 2–3 (1961); 107 Cong. Rec. 20059–20060 (1961) (remarks of Rep. Celler); *id.*, at 20061–20062 (remarks of Rep. McCulloch); Telecasting of Professional Sports Contests: Hearings on H. R. 8757 before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 1–2 (1961) (statement of Chairman Celler); *id.*, at 3 (statement of Rep. McCulloch); *id.*, at 10–28 (statement of Pete Rozelle); *id.*, at 69–70 (letter from Assistant Attorney General Loevinger).

[29] "It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the other networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to

court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.[30] And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's televison controls.[31]

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to com-

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a level far below that which would occur in a free market situation." 546 F. Supp., at 1294.

[30] "Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference.

"In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market." *Id.*, at 1318.

[31] Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval. See *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 347–349, and n. 5 (1963); *Associated Press* v. *United States*, 326 U. S., at 17–18.

pete.[32] Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.[33] This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 343 (1979). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.[34] Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman

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[32] See *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 465 (1941); *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S., at 47–49; *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904).

[33] "In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures." *Arizona* v. *Maricopa County Medical Society*, 457 U. S., at 348. The District Court provided a vivid example of this system in practice:

"A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC-Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games." 546 F. Supp., at 1291.

[34] As the District Court observed:

"Perhaps the most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised." *Id.*, at 1319.

Act was intended to prohibit. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 52–60 (1911).[35] At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete.[36] Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.[37]

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[35] Even in the context of professional football, where Congress was willing to pass a limited antitrust exemption, see n. 28, *supra*, it was concerned about ensuring that telecasts not be subject to output limitations:

"Mr. GARY. On yesterday I had the opportunity of watching three different games. There were three different games on three different channels . . . .

"Would this bill prevent them from broadcasting three different games at one time and permit the league to enter into a contract so that only one game would be permitted?

"Mr. CELLER. The bill does not prevent what the gentleman saw yesterday. As a matter of fact the antitrust exemption provided by the bill shall not apply to any package contract which prohibits the person to whom league television rights are sold or transferred from televising any game within any area except the home area of a member club on the day when that club is playing a home game.

. . . . .

"Mr. GARY. I am an avid sports fan. I follow football, baseball, basketball, and track, and I am very much interested in all sports. But I am also interested in the people of the United States being able to see on television the games that are played. I am interested in the television audience. I want to know that they are not going to be prohibited from seeing games that might otherwise be telecast.

"Mr. CELLER. I can assure the gentleman from Virginia that he need have no fears on that score." 107 Cong. Rec. 20060 (1961).

[36] The impact on competitors is thus analogous to the effect of block booking in the motion picture industry that we concluded violated the Sherman Act:

"In the first place, they eliminate the possibility of bidding for films theater by theater. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 154 (1948).

[37] 546 F. Supp., at 1294. One of respondents' economists illustrated the point:

Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market.[38] We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers*, 435 U. S., at 692.[39] Petitioner does not quarrel with the District Court's

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"[I]t's my opinion that if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently. I can take a specific example from my home state of Indiana.

"I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that [would be] a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie." App. 506–507.

See also *id.*, at 607–608.

[38] Market power is the ability to raise prices above those that would be charged in a competitive market. *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 27, n. 46; *United States Steel Corp.* v. *Fortner Enterprises*, 429 U. S. 610, 620 (1977); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 391 (1956).

[39] "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive

finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference.[40] We have never required proof of market power in such a case.[41] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.[42]

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justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981) (parenthetical omitted).

[40] Moreover, because under the plan member institutions may not compete in terms of price and output, it is manifest that significant forms of competition are eliminated. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S., at 648–649 *(per curiam); Professional Engineers*, 435 U. S., at 692–695; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 43–44 (1930).

[41] See *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 309–310 (1956); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S., at 221. See also *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 213 (1959).

[42] The Solicitor General correctly observes:

"There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of

As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games.[43] Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.[44] These findings amply support its conclusion that the NCAA possesses market power.[45] Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics[46] is vivid evidence of the uniqueness of this product.[47] Moreover, the District Court's market

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extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Brief for United States as *Amicus Curiae* 19–20 (footnote and citation omitted).

[43] See, *e. g., United States* v. *Grinnell Corp.*, 384 U. S. 563, 571 (1966); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S., at 394–395; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 612, n. 31 (1953).

[44] See 546 F. Supp., at 1297–1300. See also Hochberg & Horowitz, Broadcasting and CATV: The Beauty and the Bane of Major College Football, 38 Law & Contemp. Prob. 112, 118–120 (1973).

[45] See, *e. g., Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 27, n. 46; *id.*, at 37–38, n. 7 (O'CONNOR, J., concurring in judgment); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 504–506, and n. 2 (1969).

[46] See 546 F. Supp., at 1298–1300.

[47] As the District Court observed, *id.*, at 1297, the most analogous programming in terms of the demographic characteristics of its audience is

analysis is firmly supported by our decision in *International Boxing Club of New York, Inc.* v. *United States*, 358 U. S. 242 (1959), that championship boxing events are uniquely attractive to fans[48] and hence constitute a market separate from that for nonchampionship events. See *id.*, at 249–252.[49] Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "rest[s] on generic qualities differentiating" viewers. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 613 (1953). It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 394 (1956).[50]

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professional football, and as a condition of its limited exemption from the antitrust laws the professional football leagues are prohibited from telecasting games at times that conflict with intercollegiate football. See 15 U. S. C. § 1293.

[48] We approved of the District Court's reliance on the greater revenue-producing potential and higher television ratings of championship events as opposed to other events to support its market definition. See 358 U. S., at 250–251.

[49] For the same reasons, it is also apparent that the unique appeal of NCAA football telecasts for viewers means that "from the standpoint of the consumer—whose interests the statute was especially intended to serve," *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 15, there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.

[50] See, *e. g.*, *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 24–25; *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 7–8; *Times-Picayune*, 345 U. S., at 611–613. Petitioner seems to concede as much. See Brief for Petitioner 36–37; Tr. of Oral Arg. 6.

Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. See *Professional Engineers*, 435 U. S., at 692–696. We turn now to the NCAA's proffered justifications.

## IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws,[51] as *Broadcast Music* indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies." *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 365 (1982) (POWELL, J., dissenting) (footnote omitted). The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music*'s blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

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[51] See *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 134–136 (1969); *United States* v. *Sealy, Inc.*, 388 U. S., at 353; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597–598 (1951); *Associated Press* v. *United States*, 326 U. S., at 15–16.

The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan.[52] There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music*, 441 U. S., at 23.[53] In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint. Here production has been limited, not enhanced.[54]

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[52] See 546 F. Supp., at 1306–1308.

[53] Compare *id.*, at 1307–1308 ("The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with three-hour football games played eleven times each year"), with *Broadcast Music*, 441 U. S., at 22–23 (footnotes omitted) ("[T]o the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively").

[54] Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures. See Brodley, Joint Ventures and Antitrust

No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors.[55] This is borne out by the District Court's finding that the NCAA's television plan *reduces* the volume of television rights sold.

## V

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which *are* shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.[56]

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if

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Policy, 95 Harv. L. Rev. 1523, 1550–1552, 1555–1560 (1982). See also Note, United Charities and the Sherman Act, 91 Yale L. J. 1593 (1982).

[55] If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. See *Continental T. V., Inc.*, 433 U. S., at 54–57. Our conclusion concerning the availability of substitutes in Part III, *supra*, forecloses such a justification in this case, however.

[56] The NCAA's plan is not even arguably related to a desire to protect live attendance by ensuring that a game is not televised in the area where it is to be played. No cooperative action is necessary for that kind of "blackout." The home team can always refuse to sell the right to telecast its game to stations in the immediate area. The NCAA does not now and never has justified its television plan by an interest in assisting schools in "blacking out" their home games in the areas in which they are played.

unlimited television were permitted,[57] the District Court found that there was no evidence to support that theory in today's market.[58] Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.[59]

There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market.[60] The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers*, 435 U. S., at 696.

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[57] During this period, the NCAA also expressed its concern to Congress in urging it to limit the antitrust exemption professional football obtained for telecasting its games to contests not held on Friday or Saturday when such telecasts might interfere with attendance at intercollegiate games. See H. R. Rep. No. 1178, 87th Cong., 1st Sess., 3–4 (1961); 107 Cong. Rec. 20060–20061 (1961) (remarks of Rep. Celler); *id.*, at 20662; Hearings, *supra* n. 28, at 66–68 (statement of William R. Reed). The provision enacted as a result is now found in 15 U. S. C. § 1293.

[58] See 546 F. Supp., at 1295–1296, 1315.

[59] "[T]he greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the 'ground rules' eliminate head-to-head programming, a full nine hours of college football will have to be shown on television during a nine-to-twelve hour period on almost every Saturday of the football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance." *Id.*, at 1296.

[60] Ironically, to the extent that the NCAA's position has merit, it rests on the assumption that football telecasts are a unique product. If, as the

## VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.[61] It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any

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NCAA argues, see *supra*, at 111–112, all television programming is essentially fungible, it would not be possible to protect attendance without banning all television during the hours at which intercollegiate football games are held.

[61] See Part II, *supra*.

one league.[62] The plan is nationwide in scope and there is no single league or tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I–A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools.[63] The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

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[62] It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that in fact the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in intercollegiate football. See 546 F. Supp., at 1310–1311. Moreover, the District Court's finding that there would be more local and regional telecasts without the NCAA controls means that Northwestern could well have generated more television income in a free market than was obtained under the NCAA regime.

[63] Indeed, the District Court found that the basic reason the television plan has endured is that the NCAA is in effect controlled by schools that are not restrained by the plan:

"The plaintiffs and other CFA members attempted to persuade the majority of NCAA members that NCAA had gone far beyond its legitimate role in football television. Not surprisingly, none of the CFA proposals were adopted. Instead the membership uniformly adopted the proposals of the NCAA administration which 'legitimized' NCAA's exercises of power. The result was not surprising in light of the makeup of the voting membership. Of approximately 800 voting members of the NCAA, 500 or so are in Divisions II and III and are not subjected to NCAA television controls. Of the 275 Division I members, only 187 play football, and only 135 were members of Division I–A at the time of the January Convention. Division I–A was made up of the most prominent football-playing schools, and those schools account for most of the football games shown on network television. Therefore, of some 850 voting members, less than 150 suffer any direct restriction on their right to sell football games to television." *Id.*, at 1317.

The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising.[64] The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time, as the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so.[65] And much more than speculation supported the District Court's findings on this score. No other NCAA sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.[66]

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of

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[64] Moreover, the District Court found that those schools which would realize increased revenues in a free market would not funnel those revenues into their football programs. See *id.*, at 1310.

[65] See *id.*, at 1296, 1309–1310.

[66] See *id.*, at 1284–1285, 1299.

Reason is that equal competition will maximize consumer demand for the product.[67] The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.[68]

## VII

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than

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[67] See *Continental T. V., Inc.*, 433 U. S., at 54–57. See also n. 55, *supra*.

[68] This is true not only for television viewers, but also for athletes. The District Court's finding that the television exposure of all schools would increase in the absence of the NCAA's television plan means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes.

100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. See Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 656–657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits. Accordingly, I dissent.

## I

"While it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures, it is clear that other, non-commercial goals play a central role in their sports programs." J. Weistart & C. Lowell, The Law of Sports § 5.12 (1979). The NCAA's member institutions have designed their competitive athletic programs "to be a vital part of the educational system." Constitution and Interpretations of the NCAA, Art. II, § 2(a) (1982–1983), reprinted in App. 216. Deviations from this goal, produced by a persistent and perhaps inevitable desire to "win at all costs," have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. See G. Hanford, Report to the American Council on Education, An Inquiry into the Need for and Feasibility of a National Study of Intercollegiate Athletics 74–76 (1974) (Hanford); Marco, The Place of Intercollegiate Athletics in Higher Education: The Responsibility of the Faculty, 31 J. Higher Educ. 422, 426 (1968). The fundamental policy underlying the NCAA's regulatory program, therefore, is to minimize such deviations and "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." Constitution and Interpretations of the NCAA, Art. II, § 2(a), reprinted in App. 216. See 546 F. Supp. 1276, 1309 (WD Okla. 1982).

The NCAA, in short, "exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity." *Association for Intercollegiate Athletics for Women* v. *NCAA*, 558 F. Supp. 487, 494 (DC 1983), aff'd, 236 U. S. App. D. C. 311, 735 F. 2d 577 (1984). In pursuing this goal, the organization and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market. See *Hennessey* v. *NCAA*, 564 F. 2d 1136, 1153 (CA5 1977). "Without regulation, the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802, 817–818 (1981). The history of intercollegiate athletics prior to the advent of the NCAA provides ample support for this conclusion. By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members, many of which "are similar to those which are summarily condemned when undertaken in a more traditional business setting." Weistart & Lowell, *supra*, § 5.12.b. Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, see, *e. g.*, *Justice* v. *NCAA*, 577 F. Supp. 356 (Ariz. 1983), and the number of coaches a school may hire for its football and basketball programs, see, *e. g.*, *Hennessey* v. *NCAA*, *supra;* it also has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, see, *e. g.*, *Jones* v. *NCAA*, 392 F. Supp. 295 (Mass. 1975), restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games played, and many other aspects of intercollegiate athletics. See 707 F. 2d 1147, 1153 (CA10 1983); 546 F. Supp., at 1309. One clear effect of most, if not all, of these regulations is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." *Kupec* v. *Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (MDNC 1975). Significantly, neither the Court of Appeals nor this Court questions the validity of these regulations under the Rule of Reason. See *ante*, at 100–102, 117; 707 F. 2d, at 1153.

Notwithstanding the contrary conclusion of the District Court, 546 F. Supp., at 1316, and the majority, *ante*, at 117, I do not believe that the restraint under consideration in this case—the NCAA's television plan—differs fundamentally for antitrust purposes from the other seemingly anticompetitive aspects of the organization's broader program of self-regulation. The television plan, like many of the NCAA's actions, furthers several complementary ends. Specifically, the plan is designed

> "to reduce, insofar as possible, the adverse effects of live television . . . upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." App. 35.

See also *id.*, at 244, 323, 640, 651, 672. More generally, in my view, the television plan reflects the NCAA's fundamental policy of preserving amateurism and integrating athletics and education. Nor does the District Court's finding that the plan is intended to maximize television revenues, 546 F. Supp., at 1288–1289, 1315–1316, warrant any implication that the NCAA and its member institutions pursue this goal without regard to the organization's stated policies.

Before addressing the infirmities in the Court's opinion, I should state my understanding of what the Court holds. To do so, it is necessary first to restate the essentials of the NCAA's television plan and to refer to the course of this case in the lower courts. Under the plan at issue, 4-year contracts were entered into with the American Broadcasting Cos. (ABC), Columbia Broadcasting System (CBS), and Turner Broadcasting System (Turner) after competitive bidding. Every fall, ABC and CBS were to present 14 exposures of college football and Turner would show 19 evening games. The overall price for each network was stated in the contracts. The networks select the games to be telecast and pay directly to the colleges involved what has developed to be a uniform fee for each game telecast. Unless within one of the exceptions, only the designated number of games may be broadcast, and no NCAA member may arrange for televising its games other than pursuant to the plan. Under this scheme, of course, NCAA members must compete against one another for television appearances, although this competition is limited somewhat by the fact that no college may appear on television more than six times in any 2-year period. In 1983, 242 games were televised, 89 network games and 153 under the exceptions provided in the television plan. In 1983, 173 schools appeared on television, 89 on network games and an additional 84 teams under the exceptions. Report of the 1983 NCAA Football Television Committee to the 78th Annual Convention of the NCAA 61–65 (1984).[1]

The District Court held that the plan constituted price fixing and output limitation illegal *per se* under § 1 of the Sherman Act; it also held that the scheme was an illegal group boycott, was monopolization forbidden by § 2, and was in any event an unreasonable restraint of trade. It then entered an injunction that for all practical purposes excluded the NCAA from interfering with or regulating its members' arrangements for televising their football games. The Court of Appeals, while disagreeing with the boycott and monopolization holdings, otherwise upheld the District Court's judgment that the television plan violated the Sherman Act, focusing almost entirely on the price-fixing and output-limiting aspects of the television plan. The Court of Appeals, however, differed with the District Court with respect to the injunction. After noting that the injunction vested exclusive control of television rights in the individual schools, the court stated that, "[w]hile we hold that the NCAA cannot lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case." 707 F. 2d, at 1162. The court expressly stated, for example, that the NCAA could prevent its members from telecasting games on Friday night in competition with high school games, *ibid.*, emphasized that the disparity in revenue between schools could be reduced by "[a] properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues," *id.*, at 1159, and indicated that it was not outlawing "membership-wide contract[s] with opt-out and pass-over payment provisions, or blackout rules." *Id.*, at 1162. It nevertheless left the District Court's injunction in full force and remanded the case for further proceedings in light of its opinion. Anticipating that the Court would grant certiorari, I stayed the judgment of the Court of Appeals. 463 U. S. 1311 (1983).

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[1] Television plans with similar features have been in place since 1951. The 1951–1953 plans were submitted to the Antitrust Division of the Department of Justice for review. The Department took the matter "under study," App. 284–285, and, until this litigation, has apparently never taken the position that the NCAA's television plans were unlawful.

In affirming the Court of Appeals, the Court first holds that the television plan has sufficient redeeming virtues to escape condemnation as a *per se* violation of the Sherman Act, this because of the inherent characteristics of competitive athletics and the justifiable role of the NCAA in regulating college athletics. It nevertheless affirms the Court of Appeals' judgment that the NCAA plan is an unreasonable restraint of trade because of what it deems to be the plan's price-fixing and output-limiting aspects. As I shall explain, in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology and ignores the context in which the restraints have been imposed. But it is essential at this point to emphasize that neither the Court of Appeals nor this Court purports to hold that the NCAA may not (1) require its members who televise their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences. As I shall demonstrate, the Court wisely and correctly does not condemn such regulations. What the Court does affirm is the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast on television and that it may not contract for an overall price that has the effect of setting the price for individual game broadcast rights.[2] I disagree with the Court in these respects.

## II

"In a competitive market," the District Court observed, "each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free to sell that right to any entity it chose," and "for whatever price it could get." 546 F. Supp., at 1318. Under the NCAA's television plan, member institutions' competitive freedom is restrained because, for the most part, television rights are bought and sold, not on a per-game basis, but as a package deal. With limited exceptions not particularly relevant to antitrust scrutiny of the plan, broadcasters wishing to televise college football must be willing and able to purchase a package of television rights without knowing in advance the particular games to which those rights apply. The real negotiations over price and terms take place between the broadcasters and the NCAA rather than between the broadcasters and individual schools. Knowing that some games will be worth more to them than others, the networks undoubtedly exercise whatever bargaining power they possess to ensure that the minimum aggregate compensation they agree to provide for the package bears some relation to the average value to them of the games they anticipate televising. Because some schools' games contribute disproportionately to the total value of the package, see *id.*, at 1293, the manner in which the minimum aggregate compensation is distributed among schools whose games are televised has given rise to a situation under which less prominent schools receive more in rights fees than they would receive in a competitive market and football powers like respondents receive less. *Id.*, at 1315.

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[2] This litigation was triggered by the NCAA's response to an attempt by the College Football Association (CFA), an organization of the more dominant football-playing schools and conferences, to develop an independent television plan. To the extent that its plan contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own. To the extent that they desire continued membership in the NCAA, moreover, participation in a television plan developed by the CFA will not exempt football powers like respondents from the many kinds of NCAA controls over television appearances that the Court does not purport to invalidate.

As I have said, the Court does not hold, nor did the Court of Appeals hold, that this redistributive effect alone would be sufficient to subject the television plan to condemnation under § 1 of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics. For the same reasons, limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system. Even with shared television revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.

The Court relies instead primarily on the District Court's findings that (1) the television plan restricts output; and (2) the plan creates a noncompetitive price structure that is unresponsive to viewer demand. *Ante*, at 104–106. See, *e. g.*, 546 F. Supp., at 1318–1319. These findings notwithstanding, I am unconvinced that the television plan has a substantial anticompetitive effect.

First, it is not clear to me that the District Court employed the proper measure of output. I am not prepared to say that the District Court's finding that "many more college football games would be televised" in the absence of the NCAA controls, *id.*, at 1294, is clearly erroneous. To the extent that output is measured solely in terms of the number of televised games, I need not deny that it is reduced by the NCAA's television plan. But this measure of output is not the proper one. The District Court found that eliminating the plan would reduce the number of games on network television and increase the number of games shown locally and regionally. *Id.*, at 1307. It made no finding concerning the effect of the plan on total viewership, which is the more appropriate measure of output or, at least, of the claimed anticompetitive effects of the NCAA plan. This is the NCAA's position, and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. The NCAA would surely be an irrational "profit maximizer" if this were not the case. In the absence of a contrary finding by the District Court, I cannot conclude that respondents carried their burden of showing that the television plan has an adverse effect on output and is therefore anticompetitive.

Second, and even more important, I am unconvinced that respondents have proved that any reduction in the number of televised college football games brought about by the NCAA's television plan has resulted in an anticompetitive increase in the price of television rights. The District Court found, of course, that "the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee." *Id.*, at 1294. Undoubtedly, this is true. But the market for television rights to college football competitions should not be equated to the markets for wheat or widgets. Reductions in output by monopolists in most product markets enable producers to exact a higher price for *the same product.* By restricting the number of games that can be televised, however, the NCAA creates *a new product*—exclusive television rights—that are more valuable to networks than the products that its individual members could market independently.

The television plan makes a certain number of games available for purchase by television networks and limits the incidence of head-to-head competition between football telecasts for the available viewers. Because competition is limited, the purchasing network can count on a larger share of the audience, which translates into greater advertising revenues and, accordingly, into larger payments per game to the televised teams. There is thus a relationship between the size of the rights payments and the value of the product being purchased by the networks; a network purchasing a series of games under the plan is willing to pay more than would one purchasing the same games in the absence of the plan since the plan enables the network to deliver a larger share of the available audience to advertisers and thus to increase its own revenues. In short, by focusing only on the price paid by the networks for television rights rather than on the nature and quality of the product delivered by the NCAA and its member institutions, the District Court, and this Court as well, may well have deemed anticompetitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership.

Third, the District Court's emphasis on the prices paid for particular games seems misdirected and erroneous as a matter of law. The distribution of the minimum aggregate fees among participants in the television plan is, of course, not wholly based on a competitive price structure that is responsive to viewer demand and is only partially related to the value those schools contribute to the total package the networks agree to buy. But as I have already indicated, see *supra*, at 128, this "redistribution" of total television revenues is a wholly justifiable, even necessary, aspect of maintaining a system of truly competitive college teams. As long as the NCAA cannot artificially fix the price of the entire package and demand supercompetitive prices, this aspect of the plan should be of little concern. And I find little, if anything, in the record to support the notion that the NCAA has power to extract from the television networks more than the broadcasting rights are worth in the marketplace.

## III

Even if I were convinced that the District Court did not err in failing to look to total viewership, as opposed to the number of televised games, when measuring output and anticompetitive effect and in failing fully to consider whether the NCAA possesses power to fix the package price, as opposed to the distribution of that package price among participating teams, I would nevertheless hold that the television plan passes muster under the Rule of Reason. The NCAA argues strenuously that the plan and the network contracts "are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product in a way attractive to both fans in the stadiums and viewers on [television]. The cooperation in producing the product makes it more competitive against other [television] (and live) attractions." Brief for Petitioner 15. The Court recognizes that, "[i]f the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." *Ante*, at 115, n. 55. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 54–57 (1977). It rejects the NCAA's proffered procompetitive justification, however, on the ground that college football is a unique product for which there are no available substitutes and "there is no need for collective action in order to enable the product to compete against its nonexistent competitors." *Ante*, at 115 (footnote omitted). This proposition is singularly unpersuasive.

It is one thing to say that "NCAA football is a unique product," 546 F. Supp., at 1299, that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." *Ante*, at 111 (footnote omitted). See 707 F. 2d, at 1158–1159; 546 F. Supp., at 1298–1300. It is quite another, in my view, to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment. The NCAA has no monopoly power when competing against other types of entertainment. Should the quality of the NCAA's product "deteriorate to any perceptible degree or should the cost of 'using' its product rise, some fans undoubtedly would turn to another form of entertainment . . . . Because of the broad possibilities for alternative forms of entertainment," the NCAA "properly belongs in the broader 'entertainment' market rather than in . . . [a] narrower marke[t]" like sports or football. Grauer, Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich. L. Rev. 1, 34, n. 156 (1983). See *National Football League* v. *North American Soccer League*, 459 U. S. 1074, 1077 (1982) (REHNQUIST, J., dissenting from the denial of certiorari); R. Atwell, B. Grimes, & D. Lopiano, The Money Game 32–33 (1980); Hanford, at 67; J. Michener, Sports in America 208–209 (1976); Note, 87 Yale L. J., at 661, and n. 31.

The NCAA has suggested a number of plausible ways in which its television plan might enhance the ability of college football telecasts to compete against other forms of entertainment. Brief for Petitioner 22–25. Although the District Court did conclude that the plan is "not necessary for effective marketing of the product," 546 F. Supp., at 1307, its finding was directed only at the question whether college football telecasts would continue in the absence of the plan. It made no explicit findings concerning the effect of the plan on viewership and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing the market penetration of NCAA football. See also 707 F. 2d, at 1154–1156, 1160. The District Court's finding that network coverage of NCAA football would likely decrease if the plan were struck down, 546 F. Supp., at 1307, in fact, strongly suggests the validity of the NCAA's position. On the record now before the Court, therefore, I am not prepared to conclude that the restraints imposed by the NCAA's television plan are "such as may suppress or even destroy competition" rather than "such as merely regulat[e] and perhaps thereby promot[e] competition." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

## IV

Finally, I return to the point with which I began—the essentially noneconomic nature of the NCAA's program of self-regulation. Like Judge Barrett, who dissented in the Court of Appeals, I believe that the lower courts "erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of [an] 'every school for itself' approach to television contract bargaining." 707 F. 2d, at 1168. Although the NCAA does not enjoy blanket immunity from the antitrust laws, cf. *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), it is important to remember that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 213, n. 7 (1959).

The fact that a restraint operates on nonprofit educational institutions as distinguished from business entities is as "relevant in determining whether that particular restraint violates the Sherman Act" as is the fact that a restraint affects a profession rather than a business. *Goldfarb* v. *Virginia State Bar, supra,* at 788, n. 17. Cf. *Community Communications Co.* v. *Boulder,* 455 U. S. 40, 56, n. 20 (1982). The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb* v. *Virginia State Bar, supra,* at 788, n. 17. The Court of Appeals, like the District Court, flatly refused to consider what it termed "noneconomic" justifications advanced by the NCAA in support of the television plan. It was of the view that our decision in *National Society of Professional Engineers* v. *United States,* 435 U. S. 679 (1978), precludes reliance on noneconomic factors in assessing the reasonableness of the television plan. 707 F. 2d, at 1154; see Tr. of Oral Arg. 24–25. This view was mistaken, and I note that the Court does not in so many words repeat this error.

*Professional Engineers* did make clear that antitrust analysis usually turns on "competitive conditions" and "economic conceptions." 435 U. S., at 690, and n. 16. Ordinarily, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.,* at 691. The purpose of antitrust analysis, the Court emphasized, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.,* at 692. Broadly read, these statements suggest that noneconomic values like the promotion of amateurism and fundamental educational objectives could not save the television plan from condemnation under the Sherman Act.

But these statements were made in response to "public interest" justifications proffered in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily noneconomic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, Gulland, Byrne, & Steinbach, Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges, 52 Ford. L. Rev. 717, 728 (1984), and neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote.

When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. *Ante*, at 119. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[t]he restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement." 707 F. 2d, at 1167 (Barrett, J., dissenting). The collateral consequences of the spreading of regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice, see Note, 87 Yale L. J., at 676, n. 106; it helps ensure the economic viability of athletic programs at a wide variety of schools with weaker football teams; and it "promot[es] competitive football among many and varied amateur teams nationwide." Gulland, Byrne, & Steinbach, *supra*, at 722 (footnote omitted). These important contributions, I believe, are sufficient to offset any minimal anticompetitive effects of the television plan.

For all of these reasons, I would reverse the judgment of the Court of Appeals. At the very least, the Court of Appeals should be directed to vacate the injunction of the District Court pending the further proceedings that will be necessary to amend the outstanding injunction to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games.

# SECURITIES INDUSTRY ASSOCIATION ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1766. Argued March 21, 1984—Decided June 28, 1984

Section 16 of the Banking Act of 1933 (Act), commonly known as the Glass-Steagall Act, prohibits commercial banks from underwriting "securities or stock," and § 21 prohibits them from marketing "stocks, bonds, debentures, notes, or other securities." When Bankers Trust Co., a state commercial bank that is a member of the Federal Reserve System, began serving as agent for several of its corporate customers and marketing their commercial paper, petitioners (a national securities-industry trade association and a dealer in commercial paper) petitioned the Federal Reserve Board for a ruling that such activities were unlawful under §§ 16 and 21. Taking the position that if a particular kind of financial instrument evidences a transaction that is more functionally similar to a traditional commercial banking operation than to an investment transaction, then the instrument should not be viewed as a "security" for purposes of the Act, the Board concluded that commercial paper more closely resembles a commercial bank loan than an investment transaction and that it is not a "security" or "note" within the meaning of the Act and hence falls outside its proscriptions. The District Court disagreed, but the Court of Appeals deferred to the Board's interpretation and reversed the District Court's judgment.

*Held:* Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with its purposes, commercial paper is a "security" under the Act and therefore is subject to its proscriptions. Pp. 142–160.

(a) Although the Board's interpretation of the Act is entitled to substantial deference, this case presents considerations that counsel against giving full deference to that interpretation. The Board at the administrative level took the position that commercial paper was not a "security" within the meaning of the Act and that therefore it was unnecessary to examine the dangers that the Act was intended to eliminate, but before this Court the Board insisted that Bankers Trust's activities involved none of such dangers. *Post hoc* rationalizations by counsel for agency action are entitled to little deference. Pp. 142–144.

(b) In enacting the Act, Congress' worries about commercial-bank involvement in investment-bank activities reflected two general concerns. The first of these concerns was that a commercial bank might experience large losses from investing its funds in speculative securities. In addition to this concern, however, Congress focused on the conflicts of interest that arise when a commercial bank goes beyond the business of acting as a fiduciary or managing agent and develops a pecuniary interest in marketing securities. The Act's design reflects the congressional perception that some commercial- and investment-banking activities are fundamentally incompatible and justify a strong prophylaxis. Pp. 144–148.

(c) There is nothing in the language of either § 16 or § 21 to suggest a narrow reading of the word "securities," *i.e.*, that because the word appears in a phrase that includes "stocks, bonds, [and] debentures," the Act's prohibitions apply only to "notes [and] other securities" that resemble the enumerated instruments. To the contrary, the breadth of the term "securities" is implicit in the fact that the antecedent language encompasses not only equity securities but also securities representing debt. While the Act does not define the terms "notes" or "other securities," there is considerable evidence, particularly with respect to other Acts enacted at the same time that do define "security" to include commercial paper, to indicate that the ordinary meaning of the terms "securities" and "notes" as used in the Act encompasses commercial paper. The Board's interpretation effectively converts a portion of the Act's broad prohibitions into a system of administrative regulation, since by concluding that commercial paper is not covered by the Act, the Board in effect has obtained authority to regulate the marketing of commercial paper under its general supervisory power over member banks. Pp. 148–154.

(d) By focusing entirely on the nature of the financial instrument and ignoring the bank's role in the transaction, the Board's "functional analysis" misapprehends Congress' concerns with commercial-bank involvement in marketing securities. The facts that commercial paper is relatively low risk, that commercial banks traditionally have acquired commercial paper for their own accounts, or that commercial paper is sold largely to "sophisticated" investors, do not justify the Board's interpretation of the Act. There is little evidence to suggest that Congress intended the Act's prohibitions on underwriting to depend on the safety of particular securities. The authority to discount commercial paper is very different from the authority to underwrite it, and the Act admits of no exception to the prohibition on commercial-bank underwriting according to the particular investment expertise of the customer. Pp. 154–160.

224 U. S. App. D. C. 21, 693 F. 2d 136, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 160.

*Harvey L. Pitt* argued the cause for petitioners. With him on the briefs for petitioner A. G. Becker Incorporated were *Henry A. Hubschman*, *David M. Miles*, and *Laurence H. Tribe*. *James B. Weidner*, *John M. Liftin*, *William J. Fitzpatrick*, and *Donald J. Crawford* filed briefs for petitioner Securities Industry Association.

*Deputy Solicitor General Claiborne* argued the cause for respondents. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Barbara E. Etkind*, and *Anthony J. Steinmeyer*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves a challenge to the efforts of a state commercial bank to enter the business of selling third-party commercial paper. The Board of Governors of the Federal Reserve System (Board) concluded that such activity by state member banks is not prohibited by the Banking Act of 1933, ch. 89, 48 Stat. 162 (commonly known as the Glass-Steagall Act) because commercial paper is neither a "security" nor a "note" within the meaning of that Act and therefore falls outside the Act's proscriptions. The District Court disagreed with the Board, but the Court of Appeals deferred to the Board's interpretation and reversed the judgment of the District Court. Because commercial paper falls within

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*Briefs of *amici curiae* urging reversal were filed for Goldman, Sachs & Co. by *G. Duane Vieth*, *Leonard H. Becker*, and *Joseph McLaughlin;* and for the Investment Company Institute by *Louis Loss* and *Thomas D. Maher*.

Briefs of *amici curiae* urging affirmance were filed for Bankers Trust Co. by *John W. Barnum* and *Jennifer A. Sullivan;* and for the New York Clearing House Association et al. by *Robert S. Rifkind*, *William H. Smith*, and *Michael F. Crotty*.

the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act, and we reverse the judgment of the Court of Appeals.

## I

During 1978 Bankers Trust Company (Bankers Trust), a New York-chartered member bank of the Federal Reserve System, began serving as agent for several of its corporate customers in placing their commercial paper[1] in the commercial-paper market. Petitioners, the Securities Industry Association (SIA), a national securities-industry trade association, and A. G. Becker Inc. (Becker), a dealer in commercial paper, informally expressed concern to the Board about Bankers Trust's commercial-paper activities. SIA and Becker subsequently petitioned the Board for, among other things, a ruling that Bankers Trust's activities are unlawful under §§16 and 21 of the Act, 12 U. S. C. §§24 Seventh and 378(a)(1). Section 16 prohibits commercial banks from underwriting "securities or stock," while §21 prohibits them from marketing "stocks, bonds, debentures, notes, or other securities." Petitioners asserted that Bankers Trust's activities violated both §16 and §21.

On September 26, 1980, the Board responded to petitioners' request for enforcement of §§16 and 21 against Bankers Trust. See Federal Reserve System, Statement Regarding Petitions to Initiate Enforcement Action (1980), App. 122A (Board Statement). The Board acknowledged that Congress enacted the Act to prevent commercial banks from engaging in certain investment-banking activities, but explained that Congress did not intend the Act's prohibitions to cover every instrument that could be characterized as a "note" or "security." The Board expressed concern that such a broad interpretation might preclude commercial banks from maintaining many of their traditional activities. Accordingly, the Board took the position that "if a particular kind of financial instrument evidences a transaction that is more functionally similar to a traditional commercial banking operation than to an investment transaction, then fidelity to the purposes of the Act would dictate that the instrument should not be viewed as a security." *Id.*, at 135A. Applying this "functional analysis" to commercial paper, the Board concluded that such paper more closely resembles a commercial bank loan than an investment transaction and that it is not a "security" for purposes of the Glass-Steagall Act. Because of this determination, the Board did not consider whether Bankers Trust's involvement with commercial paper constitutes "underwriting," within the meaning of the Act.

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[1] "Commercial paper" refers generally to unsecured, short-term promissory notes issued by commercial entities. Such a note is payable to the bearer on a stated maturity date. Maturities vary considerably, but typically are less than nine months. See generally Hurley, The Commercial Paper Market, 63 Fed. Res. Bull. 525 (1977); Comment, The Commercial Paper Market and the Securities Acts, 39 U. Chi. L. Rev. 362, 363–364 (1972).

Petitioners challenged the Board's ruling in the United States District Court for the District of Columbia under, *inter alia*, the judicial-review provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, claiming that the ruling was contrary to law. The District Court reversed the ruling, finding that commercial paper falls within the scope of § 21's reference to "notes . . . or other securities." *A. G. Becker Inc.* v. *Board of Governors of Federal Reserve System*, 519 F. Supp. 602, 612 (1981). The court also found error in the Board's "functional analysis" because it focused exclusively on the role that commercial paper plays in the financial affairs of the issuer. This approach ignored the commercial bank's role in the transaction, which the District Court concluded is a central concern of the Act. *Id.*, at 615–616.

The United States Court of Appeals for the District of Columbia Circuit, by a divided vote, reversed the judgment of the District Court. *A. G. Becker Inc.* v. *Board of Governors* *of Federal Reserve System*, 224 U. S. App. D. C. 21, 693 F. 2d 136 (1982). The Court of Appeals' majority acknowledged that § 21's reference to "notes" was broad enough to include commercial paper, which is a promissory note. The court explained, however, that the term "note" was also susceptible of a narrower reading, limited to long-term debt securities closely resembling a bond or debenture but of shorter maturity. *Id.*, at 28–29, 693 F. 2d, at 143–144. Because the legislative history of the Act indicates that the 1933 Congress sought to encourage commercial banks to invest more heavily in commercial paper than in longer-term, more speculative securities, the court concluded that Congress used the term "notes" in § 21 in this narrower sense. *Id.*, at 29–31, 693 F. 2d, at 144–146. Finally, the court endorsed the Board's functional analysis of commercial paper and concluded that commercial paper more closely resembled a loan than a security because of its low default rate, the large denominations in which it is issued, and the sophistication of its buyers. In the Court of Appeals' view, these features of commercial paper eliminate the concerns that moved Congress to pass the Glass-Steagall Act. *Id.*, at 32–36, 693 F. 2d, at 147–151.

Because of the importance of the issue for the Nation's financial markets, we granted certiorari. 464 U. S. 812 (1983).

## II

The Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference. As the Court states elsewhere today, "the Board has primary responsibility for implementing the Glass-Steagall Act, and we accord substantial deference to the Board's interpretation of that Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." No. 83–614, *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System, post*, at 217. We also have made clear, however, that deference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency's interpretation of a statute "only sets 'the framework for judicial analysis; it does not displace it.'" *United States* v. *Vogel Fertilizer Co.*, 455 U. S. 16, 24 (1982), quoting *United States* v. *Cartwright*, 411 U. S. 546, 550 (1973). A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 32 (1981).

Although these principles establish in general terms the appropriate standard of review, this case presents an additional consideration that counsels against full deference to the Board. At the administrative level, the Board took the position that commercial paper was not a "security" within the meaning of the Act, and that, therefore, it did "not appear necessary to examine the dangers that the Act was intended to eliminate." Board Statement, App. 140A.[2] Before this Court, however, the Board appears to have changed somewhat the nature of its argument. The Board's counsel now insists that the activities of Bankers Trust "involv[e] none of the 'hazards' that this Court identified" as the concerns at which the Act is aimed. Brief for Respondents 40. We previously have stated that *post hoc* rationalizations by counsel for agency action are entitled to little deference: "It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Investment Company Institute* v. *Camp*, 401 U. S. 617, 628 (1971); see also *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168–169 (1962). As a result, the Board's presentation here of the policies behind the Act as they apply to this case is of less significance than it would be if it had occurred at the administrative level. Because of this apparent shift, moreover, the contours of the Board's present position are somewhat unclear; much of the Board's argument now addresses the particular characteristics of the commercial paper in this case, apparently leaving open the possibility that commercial paper with different characteristics would qualify as a "security" and be subject to the Glass-Steagall Act's proscriptions. See Brief for Respondents 33–44. To the extent that the Board has changed its position from that adopted at the administrative level, its interpretation is entitled to less weight.

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[2] Despite this conclusion, the Board responded to concerns that activity similar to that of Bankers Trust might give rise to the problems that the Act sought to avoid, and issued a policy statement with "guidelines" imposing conditions as to when state member banks may sell third-party commercial paper. See 46 Fed. Reg. 29333 (1981). The Board issued these guidelines pursuant to its supervisory authority over state member banks under §§ 9 and 11 of the Federal Reserve Act, 38 Stat. 259 and 261, as amended, 12 U. S. C. §§ 248, 321–338, and § 202 of the Financial Institutions Supervisory Act of 1966, 80 Stat. 1046, as amended, 12 U. S. C. § 1818(b).

## III

### A

In *Camp* this Court explored at some length the congressional concerns that produced the Glass-Steagall Act. Congress passed the Act in the aftermath of the banking collapse that produced the Great Depression of the 1930's. The Act responded to the opinion, widely expressed at the time, that much of the financial difficulty experienced by banks could be traced to their involvement in investment-banking activities both directly and through security affiliates. At the very least, Congress held the view that the extensive involvement by commercial banks had been unwise; some in Congress concluded that it had been illegal.[3] Senator Glass stated bluntly that commercial-bank involvement in securities had made "one of the greatest contributions to the unprecedented disaster which has caused this almost incurable depression." 75 Cong. Rec. 9887 (1932).

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[3] Several Members of Congress expressed the view that the securities activities of bank affiliates were unlawful because they were not authorized by the federal charters under which national banks operated or by the state charters under which state banks operated. See 75 Cong. Rec. 9887–9888 (1932) (remarks of Sen. Glass); *id.*, at 9911 (remarks of Sen. Bulkley).

Congressional worries about commercial-bank involvement in investment-bank activities reflected two general concerns. The first was the inherent risks of the securities business. Speculation in securities by banks and their affiliates during the speculative fever of the 1920's produced tremendous bank losses when the securities markets went sour.[4] In addition to the palpable effect that such losses had on the assets of affected banks, they also eroded the confidence of depositors in the safety of banks as depository institutions. This crisis of confidence contributed to the runs on the banks that proved so devastating to the solvency of many commercial banks.

But the dangers that Congress sought to eliminate through the Act were considerably more than the obvious risk that a bank could lose money by imprudent investment of its funds in speculative securities. The legislative history of the Act shows that Congress also focused on "the more subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary or managing agent and enters the investment banking business." *Camp*, 401 U. S., at 630. The Glass-Steagall Act reflects the 1933 Congress' conclusion that certain investment-banking activities conflicted in fundamental ways with the institutional role of commercial banks.

The Act's legislative history is replete with references to the various conflicts of interest that Congress feared to be present when a single institution is involved in both investment and commercial banking. Congress observed that commercial bankers serve as an important source of financial advice for their clients. They routinely advise clients on a variety of financial matters such as whether and how best to issue equity or debt securities. Congress concluded that it was unrealistic to expect a banker to give impartial advice about such matters if he stands to realize a profit from the underwriting or distribution of securities. See, *e. g.*, 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley). Some legislators noted that this conflict is exacerbated by the considerable fixed cost that a securities dealer must incur to build and maintain a securities-distribution system. Explaining this concern, Senator Bulkley, a major sponsor of the Act, described the pressures that commercial banks had experienced through their involvement in the distribution of securities:

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[4] The failure of the Bank of the United States, for example, was attributed largely to that bank's activities with respect to its numerous securities affiliates. Operation of the National and Federal Reserve Banking Systems: Hearings pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess., pts. 1, 7, pp. 116–117, 1017, 1068 (1931) (1931 Hearings).

> "In order to be efficient a securities department had to be developed; it had to have salesmen; and it had to have correspondent connections with smaller banks throughout the territory tributary to the great bank. Organizations were developed with enthusiasm and with efficiency. . . . But the sales departments were subject to fixed expenses which could not be reduced without the danger of so disrupting the organization as to put the institution at a disadvantage in competition with rival institutions. These expenses would turn the operation very quickly from a profit to a loss if there were not sufficient originations and underwritings to keep the sales departments busy." *Id.*, at 9911.

Congress also expressed concern that the involvement of a commercial bank in particular securities could compromise the objectivity of the bank's lending operations. Congress feared that the pressure to dispose of an issue of securities successfully might lead a bank to use its credit facilities to shore up a company whose securities the bank sought to distribute. See 1931 Hearings, pt. 7, p. 1064. Some in

Congress feared that a bank might even make unsound loans to companies in whose securities the bank has a stake or to a purchaser of securities that the bank seeks to distribute. *Ibid.* Alternatively, a bank with loans outstanding to a company might encourage the company to issue securities through the bank's distribution system in order to obtain the funds needed to repay bank loans. 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley). Congress also faced some evidence that banks had misused their trust departments to unload excessive holdings of undesirable securities. *Camp*, 401 U. S., at 633; 1931 Hearings, pt. 1, p. 237.

The Act's design reflects the congressional perception that certain investment-banking activities are fundamentally incompatible with commercial banking. After hearing much testimony concerning the appropriate form of a legislative response to the problems,[5] Congress rejected the view of those who preferred legislation that simply would regulate the underwriting activities of commercial banks. Congress chose instead a broad structural approach that would "surround the banking business with sound rules which recognize the imperfection of human nature that our bankers may not be led into temptation, the evil effect of which is sometimes so subtle as not to be easily recognized by the most honorable man." 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley). Through flat prohibitions, the Act sought to "separat[e] as completely as possible commercial from investment banking." *Board of Governors of Federal Reserve System* v.

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[5] See 1931 Hearings, pt. 1, pp. 19–22 (testimony of J. Pole, Comptroller of the Currency); *id.*, at 191–192 (testimony of A. Wiggin, chairman, Chase National Bank); *id.*, at 238–241 (testimony of B. Trafford, vice chairman, First National Bank of Boston); *id.*, pt. 2, pp. 301–304, 318 (testimony of C. Mitchell, chairman, National City Bank of New York); *id.*, at 356, 364–365 (testimony of O. Young, chairman, General Electric Co.); *id.*, pt. 3, at 539 (testimony of A. Pope, executive vice president, First National Old Colony Corp.).

*Investment Company Institute*, 450 U. S. 46, 70 (1981) *(ICI)*.[6] Such an approach was not without costs in terms of efficiency and competition, but the Act reflects the view that the subtle risks created by mixing the two activities justified a strong prophylaxis. *Camp*, 401 U. S., at 630.

### B

Sections 16 and 21 of the Act are the principal provisions that demarcate the line separating commercial and investment banking. Section 16 limits the involvement of a commercial bank in the "business of dealing in stock and securities" and prohibits a national bank from buying securities, other than "investment securities," for its own account. 12 U. S. C. § 24 Seventh. In addition, the section includes the general provision that a national bank "shall not underwrite any issue of securities or stock." Section 5(c) of the Act, 12 U. S. C. § 335, makes § 16's limitations applicable to state banks that are members of the Federal Reserve System. It is therefore clear that Bankers Trust may not underwrite commercial paper if commercial paper is a "security" within the meaning of the Act.

Section 21 also separates investment and commercial banks, but does so from the perspective of investment banks. Congress designed § 21 to prevent persons engaged in specified investment-banking activities from entering the commercial-banking business. The section prohibits any person "engaged in the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities" from receiving deposits. Bankers Trust receives deposits, and it therefore is clear that § 21's prohibitions apply to it.

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[6] We recognize, of course, that there are some activities, such as the safekeeping of securities for customers, in which Congress concluded that both commercial and investment banks may safely engage. The Act merely reflects Congress' view that those investment-banking activities that it determined to be incompatible with prudent commercial banking, such as underwriting securities, created risks that were so subtle as to justify a broad prohibition.

Because § 16 and § 21 seek to draw the same line, the parties agree that the underwriting prohibitions described in the two sections are coextensive, and we shall assume that to be the case. In any event, because both § 16 and § 21 apply to Bankers Trust, its activities in this case are unlawful if prohibited by either section. The language of § 21 is perhaps the more helpful, however, because that section describes in greater detail the particular activities of investment banking that Congress found inconsistent with the activity of commercial banks.

It is common ground that the terms "stocks," "bonds," and "debentures" do not encompass commercial paper. The dispute in this case focuses instead on petitioners' claims that commercial paper constitutes a "note" within the meaning of § 21, and, if not, that it is nevertheless encompassed within the inclusive term "other securities." Thus, petitioners claim that the plain language of the Act makes untenable the Board's conclusion that commercial paper is not a "security" within the meaning of the Act. Petitioners contend further that the role played by Bankers Trust in placing the commercial paper of third parties is precisely what the Glass-Steagall Act sought to prohibit.

### C

Neither the term "notes" nor the term "other securities" is defined by the statute. "This silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Russello* v. *United States*, 464 U. S. 16, 21 (1983), quoting *Richards* v. *United States*, 369 U. S. 1, 9 (1962). Respondents do not dispute that commercial paper consists of unsecured promissory notes and falls within the general meaning of the term "notes." See Board Statement, App. 131A; see also Brief for Respondents 2. Respondents assert, however, that the context in which the term is used suggests that Congress intended a narrower definition. Because the term appears in a phrase that includes "stocks, bonds, [and] debentures," the Board insists that the Act's prohibitions apply only to "notes [and] other securities" that resemble the enumerated financial instruments. The Board's position seems to be that because "stocks, bonds, [and] debentures" normally are considered "investments," the Act is meant to prohibit the underwriting of only those notes that "shar[e] that characteristic of an investment that is the common feature of each of the other enumerated instruments." Brief for Respondents 23. Applying that criterion to commercial paper, the Board maintains that commercial paper more closely resembles a commercial loan and that it is therefore not an investment of the kind that qualifies as a "security" under the Act.

For a variety of reasons, we find unpersuasive the notion that Congress used the terms "notes . . . or other securities" in the narrow sense that respondents suggest. First, the Court noted in *Camp* that "there is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading of the word 'securities.' To the contrary, the breadth of the term is implicit in the fact that the antecedent statutory language encompasses not only equity securities but also securities representing debt." 401 U. S., at 635.

There is, moreover, considerable evidence to indicate that the ordinary meaning of the terms "security" and "note" as used by the 1933 Congress encompasses commercial paper. Congress enacted the Glass-Steagall Act as one of several pieces of legislation collectively designed to restore public confidence in financial markets. See the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U. S. C.); the Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.;* the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.;* and the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79a *et seq.* In each of these other statutes, the definition of the term "security" includes commercial paper, and each statute contains explicit exceptions where Congress meant for the provisions of an Act not to apply to commercial paper.[7] These explicit exceptions demonstrate congressional cognizance of commercial paper and Congress' understanding that, unless modified, the use of the term "security" encompasses it.

The Securities Act of 1933, for example, defines the term "security" to include "any note." 15 U. S. C. § 77b(1). During the hearings on that Act, Senator Glass expressed dissatisfaction with that definition because it plainly did encompass commercial paper. With the support of the Board, he sought to amend the definition of the term to exclude commercial paper,[8] but Congress chose instead to exempt commercial paper from only the registration requirements of the statute, see 15 U. S. C. § 77c(a)(3),[9] while preserving application of the statute's antifraud provisions to all commercial-paper "securities." §§ 77*l*, 77q(c). Congress passed the Glass-Steagall Act two weeks later, and throughout consideration of that Act by the same Committees of the same Congress, the eponymous Senator Glass displayed no similar concern over the ordinary meaning of the broad phrase "notes . . . or other securities" in § 21.

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[7] See 15 U. S. C. § 77c(a)(3) (exempting certain "note[s]" with maturities of less than nine months from the definition of "security" for certain provisions of the Securities Act of 1933); 15 U. S. C. § 78c(a)(10) (exempting certain "note[s]" with maturities of less than nine months from the definition of "security" under the Securities Exchange Act of 1934); 15 U. S. C. § 79i(c)(3) (exempting "commercial paper and other securities" specified by the Securities and Exchange Commission from the Public Utility Holding Company Act's restriction prohibiting acquisition by a holding company of "securities").

[8] See Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 98, 120 (1933); see also Federal Securities Act: Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 180–181 (1933).

[9] It is significant that the exemption for commercial paper is described using the term "note," plainly indicating that Congress understood the ordinary meaning of that term to encompass commercial paper.

The difficulty with the Board's attempt to narrow the ordinary meaning of the statutory language is evidenced by the Board's unsuccessful efforts to articulate a meaningful distinction between notes that the Act purportedly covers and those it does not. In other statutes in which commercial paper is exempted from securities regulation, Congress either has identified a particular feature, such as maturity period, that defines the exempted class of "notes," or it has authorized a federal agency to define it through regulation. See n. 7, *supra*. The Glass-Steagall Act does neither, and the efforts by the Board and the Court of Appeals to provide a workable definition that excludes commercial paper have been fraught with uncertainty and inconsistency. The Court of Appeals concluded that the Act applies only to notes that are issued "to raise money available for an extended period of time as part of the corporation's capital structure." 693 F. 2d, at 143. It is not clear that such a distinction finds support even with reference to the statutory language from which it purportedly derives. There is no requirement, for example, that stocks, bonds, and debentures be used only to meet the capital requirements of a corporation, and, even if there were, the legislative history provides little evidence to suggest that such a distinction was one that Congress found significant.

The Board, in contrast, seems to have concluded that a note is covered by the Act only if the note is properly viewed as an "investment." The Board contends that this approach requires it to consider a "cluster" of the note's features, see Brief for Respondents 34, n. 60, such as its maturity period, its risk features, and its prospective purchasers. Stocks, bonds, and debentures display a wide range of each of these characteristics, however, and the Act's underwriting prohibition does not demonstrate any sensitivity to the characteristics of a particular issue; the Act simply prohibits commercial banks from underwriting them all. Without some clearer directive from Congress that it intended the statutory terms to involve the nebulous inquiry described by the Board, we cannot endorse the Board's departure from the literal meaning of the Act. The Court, in another context, has said pertinently: "Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history. It did not do so, however, and it is not this Court's function 'to sit as a super-legislature,' *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965), and create statutory distinctions where none were intended." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 72, n. 6 (1982).

In this respect, we find ourselves in substantial agreement with petitioners' suggestion that the Board's interpretation effectively converts a portion of the Act's broad prohibition into a system of administrative regulation. By concluding that commercial paper is not covered by the Act, the Board in effect has obtained authority to regulate the marketing of commercial paper under its general supervisory power over member banks. The Board acknowledges that "the sale of third party commercial paper by a commercial bank could involve, at least in some circumstances, practices that are not consistent with principles of safe banking." Board Statement, App. 141A. In response to these concerns, the Board issued guidelines for state member banks explaining the circumstances in which they properly may place the commercial paper of third parties. See n. 2, *supra.*

Although the guidelines may be a sufficient regulatory response to the potential problems, Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since. In 1935, for example, Congress refused to amend the Act to permit "national banks under regulations by the Comptroller of the Currency . . . to underwrite and sell bonds, debentures, and notes." H. R. Conf. Rep. No. 1822, 74th Cong., 1st Sess., 53 (1935). As recently as 1980, Congress extended to the Comptroller of the Currency authority to issue such rules as were needed to "carry out the responsibilities of the office," but expressly continued to withhold from the Comptroller the authority to issue regulations concerning "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'" Depository Institutions Deregulation and Monetary Control Act of 1980, § 708, 94 Stat. 188, 12 U. S. C. § 93a. When Congress has concluded that a particular form of notes should not be covered by the Act's prohibitions, it has amended the statute accordingly. See Banking Act of 1935, § 303(a), 49 Stat. 707, 12 U. S. C. § 378(a)(1) (exempting mortgage notes from the coverage of § 21). In the face of Congress' refusal to give the Board any rulemaking authority over the activities prohibited by the Act, we find it difficult to imagine that Congress intended the Board to engage in the subtle and ad hoc "functional analysis" described by the Board.

### D

By focusing entirely on the nature of the financial instrument and ignoring the role of the bank in the transaction, moreover, the Board's "functional analysis" misapprehends Congress' concerns with commercial bank involvement in marketing securities. Both the Board and the Court of Appeals emphasized that Congress designed the Act to prevent future bank losses arising out of investments in speculative, long-term investments. This description of the Act's underlying concerns is perhaps accurate but somewhat incomplete. "[I]n enacting the Glass-Steagall Act, Congress contemplated other hazards in addition to the danger of banks using bank assets in imprudent securities investments." *ICI*, 450 U. S., at 66. The concern about commercial-bank underwriting activities derived from the perception that the role of a bank as a promoter of securities was fundamentally incompatible with its role as a disinterested lender and adviser. This Court explained in *Camp:*

> "In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system." 401 U. S., at 634.

At the administrative level, the Board expressly chose not to consider whether these concerns are present when a commercial bank has a pecuniary interest in promoting commercial paper. Board Statement, App. 140A. Although the Board indicates before this Court that such activities do not implicate the concerns of the Act, we are unpersuaded by this belated assertion. In adopting the Act, for example, Congress concluded that a bank's "salesman's interest" in an offering "might impair its ability to function as an impartial source of credit." *Camp*, 401 U. S., at 631. In the commercial-paper market, where the distribution of an issue depends heavily on the creditworthiness of the issuer, a bank presumably can enhance the marketability of an issue by extending backup credit to the issuer. Similarly, as a commercial bank finds itself in direct competition with other commercial-paper dealers, it may feel pressure to purchase unsold notes in order to demonstrate the reliability of its distribution system, even if the paper does not meet the bank's normal credit standards. Recognizing these pressures, this Court stated in *Camp:* "When a bank puts itself in competition with [securities dealers], the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking." *Id.*, at 637.

The 1933 Congress also was concerned that banks might use their relationships with depositors to facilitate the distribution of securities in which the bank has an interest, and that the bank's depositors might lose confidence in the bank if the issuer should default on its obligations. See *id.*, at 631; 1931 Hearings, pt. 7, p. 1064. This concern would appear fully applicable to commercial-paper sales, because banks presumably will use their depositor lists as a prime source of customers for such sales. To the extent that a bank sells commercial paper to large bank depositors, the result of a loss of confidence in the bank would be especially severe.

By giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper also seems to produce precisely the conflict of interest that Congress feared would impair a commercial bank's ability to act as a source of disinterested financial advice. Senator Bulkley, during the debates on the Act, explained:

> "Obviously, the banker who has nothing to sell to his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distribution profit or a trading profit or any combination of such profits." 75 Cong. Rec. 9912 (1932).

This conflict of interest becomes especially acute if a bank decides to distribute commercial paper on behalf of an issuer who intends to use the proceeds of the offering to retire a debt that the issuer owes the bank.

In addressing these concerns before this Court, the Board focuses primarily on the extremely low rate of default on prime-quality commercial paper. We do not doubt that the risk of default with commercial paper is relatively low—lower perhaps than with many bank loans. For several reasons, however, we find reliance on this characteristic misplaced. First, it is not clear that the Board's exemption of commercial paper from the proscriptions of the Act is limited to commercial paper that is "prime." The statutory language admits of no distinction in this respect, and the logic of the Board's opinion must exempt all commercial paper from the prohibition on underwriting by commercial banks. Second, as described above, it appears that a bank can make a particular issue "prime" simply by extending backup credit to the issuer. Such a practice would seem to fit squarely within Congress' concern that banks would use their credit facilities to aid in the distribution of securities.

More importantly, however, there is little evidence to suggest that Congress intended the Act's prohibitions on underwriting to depend on the safety of particular securities. Stocks, bonds, and debentures exhibit the full range of risk; some are less risky than many of the loans made by a bank. And while the risk features of a security presumably affect whether it qualifies as an "investment security" that a commercial bank may purchase for its own account,[10] the Act's underwriting prohibition displays no appreciation for the features of a particular issue; the Act just prohibits commercial banks from underwriting any of them, with an exception for certain enumerated governmental obligations that Congress specifically has chosen to favor. See 12 U. S. C. § 24 Seventh. The Act's prophylactic prohibition on underwriting reflects Congress' conclusion that the mere existence of a securities operation, "'no matter how carefully and conservatively run, is inconsistent with the best interests'" of the bank as a whole. 75 Cong. Rec. 9913 (1932) (remarks of Sen. Bulkley, quoting a statement issued by the Bank of Manhattan Trust Co.).

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[10] It is clear that Congress' concern with commercial-bank purchases of securities was different from its concern about commercial-bank involvement in securities underwriting activities. In 1938 Congress refused to report out of committee legislation that would have allowed national banks to "underwrite or participate in the underwriting of new issues of such securities as [they] may otherwise lawfully purchase for its own account." H. R. 9441, § 1(b), 75th Cong., 3d Sess. (1938).

In this regard, the Board's focus on the fact that commercial banks traditionally have acquired commercial paper for their own accounts is beside the point. It is clearly true, as the Board asserts before this Court, that Congress designed the Glass-Steagall Act to cause banks to invest more of their funds in short-term obligations like commercial paper instead of in longer term and more speculative securities. By so doing, Congress hoped to enhance the liquidity of funds and protect bank solvency. But the authority to discount commercial paper is very different from the authority to underwrite it. The former places banks in their traditional role as a prudent lender. The latter places a commercial bank in the role of an investment banker, which is precisely what Congress sought to prohibit in the Act.[11] See Note,

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[11] The Board makes an additional argument based on § 16's restrictions on securities purchases by commercial banks. Section 16 prohibits commercial banks from "dealing in securities" on their own account altogether, and permits them to "purchase for [their] own account" only "investment securities." The Board argues that commercial paper does not constitute an "investment security" within the meaning of that term in § 16, and hence that § 16 would not permit commercial banks to purchase commercial paper for their own account if commercial paper were classified as a "security." Because commercial banks traditionally *have* acquired commercial paper for their own account, and because that practice universally has been assumed not to run afoul of the Glass-Steagall Act, the Board argues that the practice cannot be reconciled with § 16 unless commercial paper is not deemed a "security." See Brief for Respondents 17-18, 26-30.

Even if the Board is correct that commercial paper is not an "investment security" under § 16, something that we need not decide, we find the Board's argument unpersuasive because it rests on the faulty premise that the process of acquiring commercial paper necessarily constitutes "the business of dealing" in securities. The underlying source of authority for national banks to conduct business is the first sentence of § 16, which originated as § 8 of the National Bank Act of 1864, ch. 106, 13 Stat. 101. That provision grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking" and enumerates five constituent powers that constitute "the business of banking." One of those powers is "discounting and negotiating promissory notes." 12 U. S. C. § 24 Seventh. The Board appears to concede that the

A Conduct-Oriented Approach to the Glass-Steagall Act, 91 Yale L. J. 102 (1981); Comment, 9 J. Corp. L. 321 (1984).

The Board also seeks comfort in the fact that commercial paper is sold largely to "sophisticated" investors. Once again, however, the Act leaves little room for such an ad hoc analysis. In its prohibition on commercial-bank underwriting, the Act admits of no exception according to the particular investment expertise of the customer. The Act's prohibition on underwriting is a flat prohibition that applies to sales to both the knowledgeable and the naive. Congress expressed concern that commercial-bank involvement in securities operations threatened the ability of commercial banks to act as "financial confidant and mentor" for both "the poor widow" and "the great corporation." 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley). Even if purchaser-sophistication is relevant under the Act, moreover, it is not clear that commercial paper is sold only in large denominations, see Hicks, Commercial Paper: An Exempted Security Under Section 3(a)(3) of the Securities Act of 1933, 24 UCLA L. Rev. 227, 234, and n. 30 (1976), or only to sophisticated investors. See *Sanders* v. *John Nuveen & Co.*, 524 F. 2d 1064 (CA7 1975), vacated and remanded, 425 U. S. 929 (1976).

Finally, it is certainly not without some significance that Bankers Trust's commercial-paper placement activities ap-

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authority for national banks to acquire commercial paper is grounded in this authorization to discount promissory notes. See Brief for Respondents 18, n. 25. The subsequent prohibition on engaging in "[t]he business of dealing in securities" does not affect this authority; while the Glass-Steagall Act does not define the term "business of dealing" in securities, the term clearly does not include the activity of "discounting" promissory notes because that activity is defined to be a part of the "business of banking." In short, the fact that commercial banks properly are free to acquire commercial paper for their own account implies not that commercial paper is not a "security," but simply that the process of extending credit by "discounting" commercial paper is not part of the "business of dealing" in securities.

pear to be the first of that kind since the passage of the Act. The history of commercial-bank involvement in commercial paper prior to the Act is not well documented; evidently, commercial banks occasionally dealt in commercial paper, but their involvement was overwhelmingly in the role of discounter rather than dealer. See R. Foulke, The Commercial Paper Market 108 (1931); A. Greef, The Commercial Paper House in the United States 63, 403–405 (1938). Since enactment of the Act, however, there is no evidence of commercial-bank participation in the commercial-paper market as a dealer. The Board has not offered any explanation as to why commercial banks in the past have not ventured to test the limits of the Act's prohibitions on underwriting activities. Although such behavior is far from conclusive, it does support the view that when Congress sought to "separat[e] as completely as possible commercial from investment banking," *ICI*, 450 U. S., at 70, the banks regulated by the Act universally recognized that underwriting[12] commercial paper falls on the investment-banking side of the line.

## IV

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The question in this case is whether the Board of Governors of the Federal Reserve System (Board) adopted an erroneous interpretation of law when it concluded that commercial paper is not a "security" under, and hence is not subject to the proscriptions of, §§16 and 21 of the Glass-Steagall Act, 48 Stat. 184, 189, as amended, 12 U. S. C. §§24 Seventh and 378(a)(1). The area of banking law in which this question arises is as specialized and technical as the financial world it governs, and the relevant statutes are far from clear or easy to interpret. The question is accordingly one on which this Court must give substantial deference to the Board's construction. Because of the Board's expertise and experience in this complicated area of law, and because of its extensive responsibility for administering the federal banking laws, the Board's interpretation of the Glass-Steagall Act must be sustained unless it is unreasonable. No. 83–614, *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System*, *post*, at 217, and n. 16; *Investment Company Institute* v. *Camp*, 401 U. S. 617, 626–627 (1971); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844–845 (1984); *Board of Governors of Federal Reserve System* v. *Investment Company Institute*, 450 U. S. 46, 56–58 (1981); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 39 (1981).

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[12] Because of its conclusion that the commercial paper in this case was not a "security" under the Act, the Court of Appeals did not consider whether the activity of Bankers Trust constitutes "underwriting" within the meaning of § 16, or "the business of issuing, underwriting, selling, or distributing" within the meaning of § 21. We express no opinion on these matters, leaving them to be decided on remand.

Analysis of this case requires simply an examination of the usual sources of statutory interpretation—primarily the statutory language—to determine whether the Board's reading is a reasonable one, even if it is not the only reasonable one. The Court of Appeals departed from this approach when it limited its approval of the Board's position to certain kinds of sales of certain kinds of commercial paper that it thought did not present certain dangers addressed by the Glass-Steagall Act, *A. G. Becker Inc.* v. *Board of Governors of Federal Reserve System*, 224 U. S. App. D. C. 21, 36–37, 693 F. 2d 136, 151–152 (1982), and the Solicitor General, though not actually adopting a similarly limited position on behalf of the Board, has devoted a significant portion of his brief in this Court to elaborating the safety analysis underlying the Court of Appeals' limitation, Brief for Respondents 33–44. It is the Board's position, however, and not that of the Court of

Appeals or of the Solicitor General, to which deference is due. It is the Board that has the experience, expertise, and responsibility that require us to give it "considerable deference in its interpretation of the statute." *United States* v. *Mitchell*, 445 U. S. 535, 550 (1980) (WHITE, J., dissenting).[1]

The Board's own careful and thorough opinion, I believe, amply demonstrates the reasonableness—perhaps the inevitability—of its construction of the critical statutory language. Moreover, the Court's construction of the statute and petitioners' objections to the Board's position are unpersuasive. In these circumstances, the Court should defer to the Board and uphold its ruling. Because the Court does not do so, I respectfully dissent.

## I

The language of §§ 16 and 21 of the Glass-Steagall Act makes it clear that, in considering whether the Act prohibits a covered bank[2] from selling third-party commercial paper, the threshold issue is whether commercial paper is a "security" within the meaning of those two sections. See *Investment Company Institute* v. *Camp*, *supra*, at 634–635. If it is not, then commercial paper, which is a debt rather than an equity instrument, is not subject to § 16's regulation of commercial bank transactions in "securities and stock."[3] Nor

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[1] As petitioner A. G. Becker Inc. says, "[i]t is the Board's position in its ruling, of course, and not the post-hoc rationalization of its counsel, by which the Board's conduct must be judged." Reply Brief for Petitioner A. G. Becker Inc. 3, n. 5. See also *id.*, at 11, n. 23.

[2] All parties acknowledge that banks chartered under state law that are members of the Federal Reserve System, such as Bankers Trust Company, are covered by the Glass-Steagall Act by virtue of 48 Stat. 165, 12 U. S. C. § 335. See n. 12, *infra*.

[3] Section 16 of the Glass-Steagall Act reads, in relevant part:

"The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [national bank] shall not underwrite any is it subject to § 21's regulation of transactions in "stocks, bonds, debentures, notes, or *other* securities." (Emphasis added.)[4] Section 21's use of the word "other" implies that no debt instrument is within the scope of the section unless it is also a "security."

Despite differences in language, moreover, §§ 16 and 21 are coextensive in their proscriptions of commercial banks' securities activities. The two provisions approach the same problem from different directions: broadly speaking, § 16 tells firms that engage in commercial banking that they cannot engage in certain securities activities; § 21 tells firms that engage in certain securities activities that they cannot engage in commercial banking. See *Board of Governors of Federal Reserve System* v. *Investment Company Institute,*

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issue of securities or stock: *Provided,* That the [national bank] may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. . . . As used in this section the term 'investment securities' shall mean marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency." 12 U. S. C. § 24 Seventh.

[4] Section 21 of the Glass-Steagall Act reads, in relevant part:

"[I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities, or issuing securities, to the extent permitted to national banking associations by the provisions of [§ 16]." 12 U. S. C. § 378(a)(1).

450 U. S., at 62–63. Moreover, § 21 itself contains a proviso intended "to make it clear that the prohibition in Section 21 [does] not prohibit banks from conducting those securities activities permitted by Section 16." 5 V. DiLorenzo, W. Schlichting, T. Rice, & J. Cooper, Banking Law § 96.02[2], p. 96–15 (1981) (footnote omitted). See H. R. Rep. No. 742, 74th Cong., 1st Sess., 16 (1935) (hereinafter H. R. Rep. No. 742); S. Rep. No. 1007, 74th Cong., 1st Sess., 15 (1935) (hereinafter S. Rep. No. 1007).[5] Indeed, petitioners concede that §§ 16 and 21 proscribe the same securities activities by commercial banks. See Brief for Petitioner A. G. Becker Inc. 24; Brief for Petitioner Securities Industry Association 12. For this reason, the language of both provisions must be examined to determine the intended coverage of the Glass-Steagall Act.

It is apparent from the statutory language that there is no "plain meaning" of the key terms in either § 16 or § 21 that forecloses the Board's interpretation. The Glass-Steagall Act nowhere defines the term "securities," and the term is not so well defined, either generally or as a legal term of art, that commercial paper is plainly included within its meaning. In particular, nothing on the face of the Glass-Steagall Act reveals whether "securities" refers to the class of all written instruments evidencing a financial interest in a business or, alternatively, to a narrower class of capital-raising investment instruments, as opposed to instruments evidencing short-term loans used to fund current expenses. The term "notes" in § 21, on which petitioners rest their argument that the Glass-Steagall Act covers commercial paper, is likewise susceptible to different meanings. Although "note" is often used generically to refer to any written promise to pay a specified sum on demand or at a specified time, see Uniform

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[5] Section 21 states that its provisions "shall not prohibit national banks or State banks . . . from dealing in, underwriting, purchasing, and selling investment securities, or issuing securities, to the extent permitted" by § 16. 12 U. S. C. § 378(a)(1).

Commercial Code § 3–104, 2 U. L. A. 17 (1977); Black's Law Dictionary 956 (5th ed. 1979); G. Munn & F. Garcia, Encyclopedia of Banking and Finance 724–725 (8th ed. 1983), it is also used, more narrowly, to refer to a particular kind of capital-raising debt instrument distributed under an indenture agreement, like bonds or debentures but of shorter maturity, see *id.*, at 725 ("The term note also is sometimes applied to short-term bonds . . ."); 1 A. Dewing, The Financial Policy of Corporations 178 (5th ed. 1953).[6] Commercial paper, which consists of "prime quality, negotiable, usually unsecured short-term promissory notes issued by business organizations to meet part of their short-term credit needs," App. to Pet. for Cert. 65a (footnote omitted), does not come within the narrower interpretations of either "securities" or "notes." Thus, the words "securities" and "notes" in §§ 16 and 21, considered alone, are susceptible to the Board's construction.

Not only do the key terms of §§ 16 and 21, read in isolation, admit the Board's interpretation, but the provisions as a whole lend strong, perhaps decisive, support to the Board's view. A reading of §§ 16 and 21 reveals that petitioners' interpretation, like any other interpretation that treats commercial paper as a "security," does violence to the statutory language. And the Board's interpretation makes sense of the statutory language and of its history.

*Section 21.* Petitioners pin almost their entire statutory-language argument on the contention that § 21 uses the term "notes" in its generic sense, as comprising all written promises to pay a specified sum on demand or at a specified time. Aside from the absence of any affirmative evidence favoring that interpretation, there are several reasons to think that petitioners' contention about the broad meaning of "notes" is erroneous. First, § 21's mention of bonds and debentures—both of which are written promises to pay a specified sum on demand or on a specified date, see 1 Dewing, *supra*, at 169, 226—would be redundant if "notes" were as sweeping in its scope as petitioners suggest. Second, and more important, if § 21 included all written promises to pay a specified sum on demand or at a specified time, it would apply to such instruments as certificates of deposit, notes representing a bank loan to a business, bankers' acceptances, and loan participations. See Note, 91 Yale L. J. 102, 118–119, and nn. 126–129 (1981). Yet such a construction of "notes" would render unlawful much banking activity that not even petitioners urge is anything but legitimate commercial banking. For example, petitioners' reading of § 21 would make it "unlawful . . . [f]or any person . . . engaged in the business of issuing, . . . selling, or distributing . . . [certificates of deposit or bankers' acceptances] . . . to engage at the same time to any extent whatever in the business of receiving deposits . . . ." 12 U. S. C. § 378(a)(1).[7] In short, petitioners' reading of § 21 makes nonsense of the statutory language, and it therefore cannot be correct. The Board's reading, the only alternative to petitioners', gains considerable support from this conclusion.

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[6] The 1934 edition of Dewing's classic work, contemporaneous with the 1933 Glass-Steagall Act, contains the same reference to short-term bonds as "notes." A. Dewing, The Financial Policy of Corporations 75 (3d rev. ed. 1934). See also H. Moulton, The Financial Organization of Society 111–118 (2d ed. 1925); E. Mead, Corporation Finance 301 (rev. ed. 1919).

Finally, the language of § 21 provides affirmative support for the reasonableness of the Board's position that "notes" refers only to instruments characterizable as short-term bonds or debentures. In No. 83–614, *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System*, *post*,

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[7] Petitioners conceded at oral argument that certificates of deposit, for example, were notes in the generic sense of that term. See Tr. of Oral Arg. 14. The technical definition of "note" in the Uniform Commercial Code distinguishes certificates of deposit, but it does so only to define a specific class of bank-issued promises to pay money, not because a certificate of deposit is not otherwise a written promise to pay a specified sum on demand or on a specified date. See Uniform Commercial Code § 3–104, 2 U. L. A. 17 (1977).

p. 207, we rely on the "'familiar principle of statutory construction that words grouped in a list should be given related meaning,'" to support our conclusion that the Board reasonably construed the term "public sale" in § 20 of the Glass-Steagall Act, 12 U. S. C. § 377, "to refer to the underwriting activity described by the terms that surround it." *Post,* at 218 (quoting *Third National Bank* v. *Impac, Ltd.,* 432 U. S. 312, 322 (1977)). The same principle is relevant in this case. That stocks, bonds, and debentures are all instruments purchased for investment purposes suggests that "notes" should be read to refer only to instruments similarly purchased for investment purposes. More specifically, the listing of bonds, debentures, and notes as the three "securities" (as opposed to "stock") named in § 21 suggests that the ambiguity in "notes" should be resolved, as the Board has done, by reading the term to refer to instruments similar in character to bonds and debentures. In sum, the Board's position makes good sense of § 21's list of financial instruments by giving the items in the list related meanings.

*Section 16.* The language of § 16, like that of § 21, cannot bear petitioners' construction. Any reading of § 16 that deems commercial paper a "security" leaves federal banking law laden with contradictions.

Section 16 flatly forbids covered banks to purchase "securities and stock" for their own accounts, but it makes a limited exception for "investment securities." See n. 3, *supra.*[8] It is undisputed that commercial banks may purchase commercial paper for their own accounts.[9] Hence, if commercial paper is a "security" within the meaning of § 16, it must be an "investment security." To put the same point in the reverse order, if commercial paper is not an "investment security," it cannot be a security covered by § 16 at all: otherwise, contrary to what even petitioners acknowledge to be so, banks could not buy it for their own accounts. The Board concluded that commercial paper is not an "investment security," and therefore is not a "security," under § 16, App. to Pet. for Cert. 69a–74a, and that conclusion is at the very least a reasonable one. Petitioners nowhere dispute the conclusion that commercial paper is not an investment security; indeed, they effectively concede that it is correct. See Tr. of Oral Arg. 7.

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[8] The Court suggests that § 16's reference to the "business of dealing in securities and stock" means that § 16 does not flatly prohibit covered banks from purchasing securities and stock for their own accounts, except as authorized by the proviso, but only from the "business of dealing" in them. *Ante,* at 158–159. Not even petitioners, however, dispute the proposition that § 16 constitutes a flat ban on purchasing, subject to the proviso. Indeed, the legislative history makes clear that Congress so intended § 16. In particular, stock, which is not subject to the proviso, simply may not be purchased by commercial banks for their own accounts. See S. Rep. No. 77, 73d Cong., 1st Sess., 16 (1933); S. Rep. No. 1007,

The reasons may be briefly summarized. Section 16 defines "investment security" to mean "marketable obligations, evidencing indebtedness of any person, copartnership, asso-

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p. 17; H. R. Rep. No. 742, p. 18; 5 V. DiLorenzo, W. Schlichting, T. Rice, & J. Cooper, Banking Law § 96.02[2], p. 96-16 (1981).

The Court also treats the purchasing and underwriting prohibitions in the Act as if they were entirely separate. See *ante*, at 158–159. That treatment is inconsistent with the statutory language. There is no escaping the fact that any "security" that the Act forbids a commercial bank to underwrite the Act also forbids the bank to purchase, unless it is an investment security. Although the purposes of the prohibitions are somewhat different, the link between the prohibitions, at least as far as this case is concerned, is indissoluble.

[9] Indeed, the Board observed that commercial banks have long purchased commercial paper for their own accounts. See App. to Pet. for Cert. 74a, n. 17. See also A. Greef, The Commercial Paper House in the United States 95–96 (1938); R. Foulke, The Commercial Paper Market 65–74 (1931). No one in this litigation or anywhere else has ever suggested that commercial banks do not "purchase" commercial paper. Indeed, not only do the Board and the standard histories of commercial paper refer to banks' "purchasing" of commercial paper, see, *e. g.*, App. to Pet. for Cert. 74a, n. 17; Greef, *supra*, at 292–325, 335–346; Foulke, *supra*, at 65–98, but so too do petitioners, see Brief for Petitioner A. G. Becker Inc. 39; Brief for Petitioner Securities Industry Association 28; Reply Brief for Petitioner Securities Industry Association 3.

ciation, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term . . . as may by regulation be prescribed by the Comptroller of the Currency." 12 U. S. C. § 24 Seventh. The Comptroller has never designated commercial paper as an investment security. Moreover, in 1971 the Comptroller's Chief Counsel took the position that commercial paper does not constitute an investment security. See App. to Pet. for Cert. 73a. In addition, the federal banking regulators, including the Comptroller, have always treated a bank's purchase of commercial paper as a loan: it must be treated as such in federally required bank reports, and the Comptroller views the statutory limits on loans to individual borrowers, 12 U. S. C. § 84, as distinct from § 16's limits on holding investment securities of a single issuer, 12 CFR § 7.1180 (1983). See App. to Pet. for Cert. 72a–73a.

History also supports the Board's conclusion that commercial paper is not an investment security. The phrase "investment security" originated in the McFadden Act of 1927, 44 Stat. (part 2) 1224, and the Glass-Steagall Act did not purport to alter the meaning of the phrase. The McFadden Act affirmed the authority of national banks to deal in "investment securities," subject to certain restrictions: it was intended to provide express statutory authorization for national banks' longstanding practice of dealing in corporate bonds. See H. R. Rep. No. 83, 69th Cong., 1st Sess., 3–4 (1926). Congressman McFadden, the sponsor of the Act, expressly stated during floor debate on the bill that commercial paper had not been and would not be regarded as an "investment security" and hence would be subject to the statutory limitations on loans, not to the restrictions of the McFadden Act. 67 Cong. Rec. 3232 (1926). This statement, which was not disputed by anyone in Congress, accurately reflects the fact that banks' involvement with commercial paper had long been understood as distinct from their involvement with investment instruments, since the purchase of commercial paper was regarded as the making of a short-term loan rather than as an investment.[10] Indeed, as the Board pointed out, "historical studies of the commercial paper market . . . indicate that banks purchased and sold commercial paper (and served as commercial paper dealers) pursuant to their lending functions long before commercial banks began expanding their activities into the underwriting of corporate bonds and other debt obligations after the Civil War, activities that were restricted by the McFadden legislation concerning investment securities and, six years later, by the Glass-Steagall Act." App. to Pet. for Cert. 72a; see *id.*, at 72a, n. 13 (citing, *inter alia*, Greef, *supra* n. 9, at 6–7, 15–18, 63, 403–405; Foulke, *supra* n. 9, at 108). In sum, commercial paper has never been treated, and was not intended to be treated, as an investment security under either the McFadden or the Glass-Steagall Act. Given that banks covered by § 16 have the authority to purchase commercial paper for their own accounts, which they could not do if commercial paper were a security under § 16, it follows that commercial paper cannot be a security within the meaning of the Glass-Steagall Act.

Having established that commercial paper is not an "investment security," it is also possible to draw support for the Board's conclusion from the original 1933 language of § 16. As enacted in 1933, § 16 prohibited national banks from purchasing "investment securities" for their own account and from underwriting any "issue of securities," but the proviso permitted the purchase of "investment securities" subject to the regulation of the Comptroller of the Currency.[11] Thus, the original version of § 16 simply does not apply to any instrument, like commercial paper, that is not an investment security. In 1935 Congress altered this language, but it did so simply "to make it clear that national banks and other member banks may purchase and sell stocks for the account of their customers but not for their own accounts." H. R. Rep. No. 742, p. 18. See also S. Rep. No. 1007, p. 16. Congress had no intent to change the coverage of § 16 with respect to nonequity instruments. In short, the 1933 version of § 16, which was unaltered in any respect relevant to commercial paper, lends strong support to the Board's position that the Glass-Steagall Act does not apply to commercial paper, which is not an "investment security."

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[10] In order for commercial paper to be eligible for discount at Federal Reserve banks, its proceeds may not "be used for permanent or fixed investments of any kind, such as land, buildings, or machinery, or for any other fixed capital purpose" or "for transactions of a purely speculative character" or "for . . . trading in . . . investment securities except direct obligations of the United States." Consistent with the short maturity of commercial paper, the proceeds must be used "in producing, purchasing, carrying, or marketing goods," "meeting current operating expenses," or "carrying or trading in direct obligations of the United States." G. Munn & F. Garcia, Encyclopedia of Banking and Finance 196 (8th ed. 1983).

Indeed, there is good reason to think that Congress understood the term "securities" to mean nothing broader than "investment securities." First, the 1935 amendment to § 16 substituted "securities and stock" for "investment securities" without suggesting that § 16's application to nonequity instruments was being in any way expanded. Similarly, the proviso in § 21, see n. 5, *supra*, enacted into law in 1935 along with the amendment to § 16, refers only to "investment securities" insofar as it addresses banks' "dealing in, underwriting, purchasing, and selling"; yet it is clear, and it is conceded, that the proviso was intended to make § 21's prohibitions coextensive with those of § 16 with respect to all securities activities. See H. R. Rep. No. 742, p. 16 (amendment makes clear that § 21 "does not prohibit any financial institution or private banker from engaging in the securities business to the limited extent permitted to national banks under [§ 16]"); S. Rep. No. 1007, p. 15 (amendment provides that § 21 "should not be construed as prohibiting banks, bankers, or financial institutions from engaging in securities activities within the limits expressly permitted in the case of national banks under [§ 16]"). Moreover, § 5(c) of the Glass-Steagall Act likewise refers only to "investment securities and stock";[12] yet that provision, as petitioners concede, makes § 16 of the Glass-Steagall Act applicable in full to "state member banks" like the Bankers Trust Company, see Brief for Petitioner A. G. Becker Inc. 2, n. 2; Brief for Petitioner Securities Industry Association 3, n. 3. All of these congressional enactments presuppose that Congress understood "securities" and "investment securities" to refer to the same class of debt instruments, a class that excludes commercial paper.

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[11] Section 16 of the Glass-Steagall Act as enacted in 1933 reads, in relevant part:

"The business of dealing in investment securities by the [bank] shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities; *Provided*, That the [bank] may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe .... As used in this section the term 'investment securities' shall mean marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency." 48 Stat. 184.

This conclusion confirms the Board's view that §§ 16 and 21, as amended in 1935, were intended to apply only to investment instruments akin to stocks, bonds, and debentures. It also comports with what the legislative history reveals to have been of concern to the Congress that enacted Glass-Steagall. During the extensive legislative hearings and debates leading up to the enactment of the Glass-Steagall Act, Congress focused its attention on commercial banks' participation in the markets for long-term and speculative securities, and commercial paper was distinguished from the investment securities that Congress was worried about. See S. Rep. No. 77, *supra* n. 8, at 4, 8, 9; 75 Cong. Rec. 9904, 9909, 9910, 9912 (1932).[13] Moreover, although commercial banks' purchasing activities were a major subject of congressional concern, and although commercial banks were the dominant buyers of commercial paper at the time, no one in Congress, as far as anything brought to this Court's attention shows, ever adverted to banks' commercial paper activities as contributing to the difficulties at which the Act was aimed. See App. to Pet. for Cert. 75a–76a. Thus, the legislative history shows Congress to have been concerned with commercial banks' involvement with investment instruments, as the Board contends, and not with their involvement with commercial paper.

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[12] Section 5(c) of the Glass-Steagall Act provides:

"State member banks shall be subject to the same limitations and conditions with respect to the purchasing, selling, underwriting, and holding of investment securities and stock as are applicable in the case of national banks under [§ 16]." 48 Stat. 165, 12 U. S. C. § 335.

In sum, the language of §§ 16 and 21 strongly supports the Board's interpretation. Indeed, petitioners have suggested no other construction that can be accommodated by the language of the statute. Since the legislative history makes it impossible to argue that Congress intended something contrary to the statutory language, the Board's conclusion about legislative intent concerning commercial paper appears to be compelled by statute. In any event, it is certainly "a reasonable construction of the statutory language and is consistent with legislative intent." No. 83–614, *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System*, *post*, at 217.

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[13] See also Operation of the National and Federal Reserve Banking Systems: Hearings on S. 4115 before the Senate Committee on Banking and Currency, 72d Cong., 1st Sess., pt. 1, pp. 66–67, 146 (1932); Operation of the National and Federal Reserve Banking Systems: Hearings pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess., App., pt. 7, pp. 1006–1019 (1931).

## II

Petitioners advance several arguments in an effort to demonstrate the error of the Board's reading of the Glass-Steagall Act, but these arguments are unavailing. It is worth noting at the outset that I have no quarrel with the Court's extensive discussion of the general policies behind the Glass-Steagall Act. *Ante*, at 144–148. None of that discussion, however, speaks to the threshold question whether commercial paper is among the "securities" to which Congress thought those policies would apply when it adopted the Act. For all of the reasons given above, the Board's negative answer to that question is all but mandated by the statutory language and is not contradicted by anything in the legislative history. The Board came to the reasonable conclusion that Congress simply had no intention to apply its policies to commercial paper.

Petitioners argue that Congress understood commercial paper to be a "security" in enacting the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*, the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (containing an express exclusion of commercial paper from the definition of "security," 48 Stat. 882, as amended, 15 U. S. C. § 78c(a)(10)), and the Public Utility Holding Company Act of 1935, 49 Stat. 803, as amended, 15 U. S. C. § 79a *et seq.* They suggest that this contemporaneous congressional understanding of the scope of the term "securities" requires commercial paper to be treated as a "security" within the meaning of the Glass-Steagall Act. Even accepting its premise, however, the argument does not affect the merits of the Board's position.

In determining the meaning of a term in a particular statute, the meaning of the term in other statutes is at best only one factor to consider, and it may turn out to be utterly irrelevant in particular cases. Congress need not, and frequently does not, use the same term to mean precisely the same thing in two different statutes, even when the statutes are enacted at about the same time. In this case, the argument from other statutes has little or no weight. Petitioners, who make this argument entirely in the abstract, offer no reason to think that Congress specifically intended "security" to have the same meaning in the Glass-Steagall Act and the securities laws, and the first part of this opinion shows that there are many reasons to think otherwise. In addition, the securities laws' definitions of "security" include some instruments that plainly do not constitute securities under the Glass-Steagall Act. For example, bankers' acceptances are securities under § 2(1) of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77b(1), yet commercial banks have long bought and sold and dealt in bankers' acceptances as a proper part of their commercial banking, the Board having determined in 1934 that bankers' acceptances were not securities under the Glass-Steagall Act. See App. to Pet. for Cert. 81a.[14]

That the term "securities" should have different meanings in the different statutes makes good sense. The purposes of the banking and securities laws are quite different. The Glass-Steagall Act was designed to protect banks and their depositors. See *Board of Governors of Federal Reserve System* v. *Investment Company Institute*, 450 U. S., at 61; 75 Cong. Rec. 9913–9914 (1932) (remarks of Sen. Bulkley). The securities laws were designed more generally to protect investors and the general public. See *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 849 (1975).

In response to the demonstration that the language of §§ 16 and 21 simply cannot accommodate their view without outlawing concededly lawful commercial bank activities, petitioners argue that at least some of the activities at issue are authorized by other statutory language. Most important, petitioners observe, national commercial banks have been authorized to purchase commercial paper on their own accounts, under their authority to discount and negotiate promissory notes, since enactment of the National Bank Act in 1864, 13 Stat. 101, currently codified in 12 U. S. C. § 24 Seventh, immediately prior to § 16 of the Glass-Steagall Act. Thus, a national bank has the power "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter."

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[14] The Board observed in its ruling under review in this case that similar problems might arise with respect to certificates of deposit, passbook savings accounts, loan participations, and bills of exchange. App. to Pet. for Cert. 81a–82a.

The existence of separate statutory authorizations for banking activity prohibited by petitioners' reading of the Glass-Steagall Act, however, only reinforces the Board's conclusion that "notes" and "securities" cannot have the broad meaning in §§ 16 and 21 that petitioners attribute to it. If any such statutory authorizations and the proscriptions of the Glass-Steagall Act are both to remain in force, only two conclusions are possible. Either the terms "notes" and "securities" must have a meaning narrower than the generic one; or there is a conflict of statutes that cannot be resolved by any interpretation of the statutory language, so that one part of federal banking law must be read as implicitly repealing or overriding another. The latter alternative is a last resort, however, and must be avoided where an interpretation of the statutory language is available that is consistent with legislative intent and that shows the conflict to be merely apparent and not real. As shown above, the Board's reading of §§ 16 and 21 is such an interpretation. It makes sense of the language of federal banking law: for example, it construes "notes" in § 21, in accordance with the terms that surround it in the statute, as referring to investment instruments and hence as not including commercial paper; at the same time, it construes "promissory notes" in the "discounting and negotiating" language of the National Bank Act, in accordance with the terms that surround it in the statute, as referring to commercial banking instruments and hence as including commercial paper. Petitioners and the Court, by contrast, have not suggested any way out of the flat contradictions that their view of the Glass-Steagall Act creates in federal banking law. It was reasonable for the Board to conclude, App. to Pet. for Cert. 74a–75a, that the language of §§ 16 and 21 itself makes untenable the broad reading of "notes" and "securities" that petitioners suggest and should be read in the narrow fashion set out in the Board's opinion.

Petitioners also contend that the Board's position is shown to be erroneous by the fact that almost 50 years elapsed between the enactment of the Glass-Steagall Act and the Board's ruling. This fact, of course, does not undermine—it does not even address—the otherwise unanswered arguments in support of the Board. In any event, it is of little significance. This is not a case in which a contemporaneous agency construction is later abandoned by the agency. Until it ruled in the Bankers' Trust matter, the Board never took a position on the applicability of the Glass-Steagall Act to commercial paper. That the Board was not asked for almost 50 years to take a position on this question, moreover, simply cannot count for much. There might be any number of reasons—for example, economic reasons (comparative unattractiveness of selling commercial paper) or sociological reasons (conservativism of commercial banks)—to account for commercial banks' not having sought to sell commercial paper until the late 1970's. This Court is in no position to conclude that there simply could be no explanation for this long silence other than the clarity of the Glass-Steagall Act's prohibition, especially when neither statutory language nor legislative history supports such a conclusion.

In response to the Board's contention that the language of § 21 is reasonably construed to apply only to instruments with the characteristics of an investment, petitioners argue that there is no single set of such characteristics that are common features of stocks, bonds, and debentures, the items listed in § 21 that the Board takes as the starting point for its interpretation. This argument, however, mistakenly places "stocks," on the one hand, and "bonds" and "debentures," on the other, into a single class. Section 16's reference to "securities and stock" establishes that the Glass-Steagall Act distinguishes two classes—"securities," which includes only (though not necessarily all) debt instruments, such as bonds and debentures; and "stock," which includes only equity instruments. The Board's interpretation of "notes" accordingly need assimilate the term only to the class that includes bonds and debentures, not the class that consists of stock, in order to justify reliance on the canon of statutory construction that words placed together should be given a related meaning. See *supra*, at 166–167. The Board's interpretation, which reads "notes" as referring to short-term debt instruments, like bonds and debentures, issued under indenture agreements, does just that.

The Court decries the Board's approach as transforming the Glass-Steagall Act from the prohibitory statute that Congress enacted into a quite different statute delegating regulatory authority over the area to the Board. To be sure, the Board takes the position that the distinguishing characteristic of the instruments covered by the Glass-Steagall Act is whether the instruments represent investment transactions rather than bank-loan transactions. An investment instrument, according to the Board, may be distinguished by reference to a cluster of related characteristics not possessed by commercial paper—for example, the absence of a short maturity, the existence of a substantial secondary market for them, their bearing of "market" risk in addition to "credit" risk, the issuer's freedom to use the proceeds for fixed capital purposes, their common availability to purchasers in small denominations, and their commonly being bought by a large number of purchasers.

There is nothing the least bit unusual about the "cluster" approach to defining a legal term or concept. That is precisely the approach taken by the law every time it gives definition to a term by specifying a set of "factors" to be considered rather than a set of necessary and sufficient conditions to be checked off. The law is replete with instances of this approach, made necessary by the intrinsic complexity and untidiness of our legal concepts and of the world to which they are designed to apply. This approach is hardly out of place in the law's attempt to describe and regulate the financial world, with all its intricacies and its bewildering variety of nominally different but substantively similar (if not identical) financial instruments and transactions.

There is simply no escaping some kind of functional analysis to separate the commercial and investment banking worlds in particular cases, which petitioners acknowledge is at least one chief aim of the Glass-Steagall Act. As noted above, see *supra*, at 165–169, the language of §§ 16 and 21 cannot be read in the sweeping fashion suggested by petitioners: otherwise, those provisions would prohibit concededly permitted commercial bank involvement with a variety of instruments such as commercial paper. Petitioners have suggested no way to make the distinctions needed to give sense to the statutory language that does not involve a functional analysis of what constitutes investment banking and what constitutes commercial banking. For example, petitioners have suggested no way to distinguish the "discounting and negotiating" of "promissory notes," permitted by the National Bank Act, from the "purchasing" of "notes," prohibited by §§ 16 and 21 of the Glass-Steagall Act, a distinction that their position requires them to make. It is hard to imagine how that distinction might be drawn without using a "functional" approach to defining the difference between the commercial and investment banking worlds.

Finally, contrary to petitioners' allegation, the Board's functional analysis does not vest the Board with a substantial amount of regulatory discretion. In particular, it does not permit the Board to make case-by-case judgments about the Glass-Steagall Act's application to a particular instrument based on the instrument's safety and on whether it presents the dangers addressed by the Act. Indeed, the Board specifically declined to conduct a policy analysis of whether certain commercial paper activities presented the dangers at which the Act was aimed. See App. to Pet. for Cert. 83a. The Board, unlike the Court of Appeals, concluded that the Glass-Steagall Act is inapplicable to all commercial paper, not just to the particular kinds of commercial paper sold by Bankers Trust, *ibid.* The Board's conclusion about the meaning of the Glass-Steagall Act was simply a construction of the statute; it was only under distinct statutory authority to restrain unsafe or unsound banking practices, 38 Stat. 259, 261, as amended, 12 U. S. C. §§248 and 321; 64 Stat. 879, as amended, 12 U. S. C. §1818(b), that the Board issued its guidelines specifying the kinds of commercial paper sales by commercial banks that it would permit.

The Board employed its functional analysis as one small part of its inquiry into the best construction of the statute. The Board did not purport in its ruling to lay down rules for determining what other instruments have the characteristics of an investment instrument so as to constitute a "security" under the Glass-Steagall Act. It simply reasoned that the language and history of the Act demonstrated that the Act does not cover commercial paper. Critical to the Board's conclusion is the fact that federal banking law treats commercial paper in such a way as to give rise to a flat contradiction if the Glass-Steagall Act were interpreted to embrace it. Because of its characteristics, commercial paper has long been treated, by federal law and by bankers, not as an investment instrument but as an instrument that commercial banks may purchase without regard to the proscriptions of the Glass-Steagall Act. Thus, the Board's placing of commercial paper in the commercial rather than investment banking world is firmly rooted in the statutory language and in a longstanding practice whose lawfulness is not even subject to dispute. Nothing in the Board's ruling extends to any instrument not already widely and lawfully purchased by commercial banks, and petitioners have not identified any class of financial instruments other than commercial paper that would come within the Board's reasoning in this case. The Board's ruling, in other words, is a narrow one with few implications for other applications of the Glass-Steagall Act.

## III

The dangers that Congress sought to eliminate when it enacted the Glass-Steagall Act are easily stated at a level of generality that might make the Board's ruling appear inconsistent with congressional policies. The translation of policy into legislation, however, is always complicated by the necessity of taking into account potentially competing and overlapping laws and policies. The task of this Court, therefore, is to interpret the statutory language that Congress enacted into law. Careful attention to the statutory language is especially important in an area as technical and complex as banking law, where the policies actually enacted into law are likely to be complicated and difficult for a nonspecialist judiciary to discern in their proper perspective.

In this case, the statutory language strongly supports the construction adopted by the Board, and it cannot bear the only construction proposed by petitioners and adopted by the Court. The Board's construction is also wholly consistent with the legislative history. It is singularly inappropriate for this Court, reasoning from the general policies it finds in the statute and with little regard for the statutory language, to reject the construction of the statute adopted by the Board after careful consideration and with full explanation. It is the Board, and not this Court, that has both responsibility for the oversight of much of our Nation's banking system and expertise and experience in applying the arcane body of law that governs it. When the statutory support for the Board's position is as strong as it is in this case, the Court's rejection of the agency's position is unjustified.

I would uphold the Board's ruling that commercial paper does not constitute a "security" within the meaning of the Glass-Steagall Act. Because the Court of Appeals' opinion does not squarely uphold the Board's statutory construction, I would affirm only the judgment of the Court of Appeals, which reverses the District Court's judgment declaring the Board's ruling unlawful.

I respectfully dissent.

# DAVIS ET AL. *v.* SCHERER

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83–490. Argued April 16, 1984—Decided June 28, 1984

To avoid conflicts of interest, an order of the Florida Department of Highway Safety and Motor Vehicles (Department) required that proposed outside employment of members of the Florida Highway Patrol be approved by the Department. Appellee, a Highway Patrol employee, originally received permission in 1977 to accept part-time employment with a County Sheriff's Office, but the permission was later revoked. When appellee refused to quit his part-time job, the Director of the Highway Patrol, in 1977, ordered that appellee's employment with the Patrol be terminated. While appellee's administrative appeal was pending, he and the Department settled the dispute, and he was reinstated. But friction between appellee and his superiors continued, and he resigned in 1979 after he was suspended from the Patrol. Appellee then filed the present suit against appellants, certain present and former officials of the Department and the Highway Patrol, seeking relief under 42 U. S. C. § 1983. He requested a declaration that appellants in 1977 had violated the Due Process Clause of the Fourteenth Amendment by discharging him without a formal pretermination or a prompt post-termination hearing, and he sought an award of money damages. Granting the requested relief, the court ultimately held that appellants had forfeited their qualified immunity from suit under § 1983 because even though appellee's due process rights were not "clearly established" at the time of his discharge in 1977, appellants had not followed administrative regulations in discharging appellee. The court concluded that therefore appellants' belief in the legality of their conduct was unreasonable and they were not entitled to qualified immunity. The Court of Appeals affirmed.

*Held:* A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. Appellee made no such showing. Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established law. No other circumstances are relevant to the issue of qualified immunity. *Harlow* v. *Fitzgerald,* 457 U. S. 800. Pp. 190–197.

(a) As the District Court recognized, there was authoritative precedent in the Circuit that the constitutional right of a state employee to a pretermination or a prompt post-termination hearing was not well established at the time of the conduct in question. Nor was it unreasonable, under Fourteenth Amendment due process principles, for the Department to conclude that appellee had been provided with the fundamentals of due process. Thus, the District Court correctly held that appellee demonstrated no violation of his *clearly established* constitutional rights. Pp. 191–193.

(b) Appellants did not forfeit their qualified immunity from suit for violation of federal constitutional rights merely because they failed to comply with a clear state regulation. Appellee contended that an official's violation of a clear state statute or regulation, although not itself actionable under § 1983, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions. If such view were adopted, it would disrupt the proper balance between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. Nor would it always be fair, or sound policy, to demand official compliance with a statute or regulation on pain of money damages. Officials are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively. In these circumstances, officials should not err always on the side of caution. Pp. 193–196.

710 F. 2d 838, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 197.

*Mitchell D. Franks* argued the cause for appellants. With him on the briefs were *Jim Smith*, Attorney General of Florida, and *Vicki Gordon Kaufman*, *Bruce A. Minnick*, and *Pamela Lutton-Shields*, Assistant Attorneys General.

*Richard G. Wilkins* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Barbara L. Herwig*, and *John F. Cordes*.

*Bruce S. Rogow* argued the cause and filed a brief for appellee.*

JUSTICE POWELL delivered the opinion of the Court.

Appellants in this case challenge the holding of the Court of Appeals that a state official loses his qualified immunity from suit for deprivation of federal constitutional rights if he is found to have violated the clear command of a state administrative regulation.

## I

The present controversy arose when appellee Gregory Scherer, who was employed by the Florida Highway Patrol as a radio-teletype operator, applied for permission from the Patrol to work as well for the Escambia County Sheriff's Office as a reserve deputy. To avoid conflicts of interest, an order of the Florida Department of Highway Safety and Motor Vehicles required that proposed outside employment of Patrol members be approved by the Department. A letter from appellee's troop commander, Capt. K. S. Sconiers, dated September 1, 1977, granted appellee permission to accept the part-time work. The letter noted that permission would be rescinded "should [the] employment interfere . . . with your duties with [the] department." 543 F. Supp. 4, 8 (ND Fla. 1981). Later that month, Capt. Sconiers informed appellee by memorandum that permission to accept the employment was revoked. As Capt. Sconiers explained at trial, his superiors in the Highway Patrol had determined that appellee's reserve deputy duties could conflict with his duties at the Highway Patrol.

Appellee continued to work at the second job, despite the revocation of permission. Oral discussions and an exchange of letters among appellee and his superiors ensued. Sgt.

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**Michael S. Helfer*, *Burt Neuborne*, and *Charles S. Sims* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Clark, appellee's immediate superior, advised appellee that he was violating instructions; appellee explained that he had invested too much money in uniforms to give up his part-time work. Lt. Wiggins, the next highest officer in the chain of command, then orally and by memorandum ordered appellee to quit his part-time job. Appellee explained to Lt. Wiggins that he saw no conflict between the two jobs and would not quit his second job.

Sgt. Clark and Lt. Wiggins had submitted memoranda to Capt. Sconiers that described appellee's continued employment and their conversations with appellee. Appellee also wrote to Capt. Sconiers explaining that he saw no reason to resign his outside employment. So advised, Capt. Sconiers recommended to Col. J. E. Beach, director of the Florida Highway Patrol, that appellee be suspended for three days for violation of the dual-employment policy. Capt. Sconiers submitted a number of documents, including his own letters approving appellee's request and rescinding the approval; appellee's letter of request and subsequent letter explaining his refusal to quit his job; and the memoranda of Sgt. Clark and Lt. Wiggins.[1] On the basis of these documents, Col. Beach on October 24, 1977, ordered that appellee's employment with the Florida Highway Patrol be terminated.

On November 10, 1977, appellee filed an appeal with the Florida Career Service Commission. Before the Commission had heard appellee's administrative appeal from his dismissal, appellee and the Department settled the dispute. The settlement reinstated appellee with backpay. But friction between appellee and his superiors continued, and in January 1979, after appellee was suspended from the Patrol, he resigned "to avoid further harassment and to remove a cloud over his employability." *Id.*, at 11.

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[1] One memorandum reported to Capt. Sconiers that appellee had continued to work at his second job; a second had been addressed by Lt. Wiggins to appellee; other memoranda summarized Lt. Wiggins' and Sgt. Clark's discussions with appellee.

Appellee then filed the present suit against appellants in the United States District Court for the Northern District of Florida, seeking relief under 42 U. S. C. § 1983.[2] Appellee's complaint alleged that appellants in 1977 had violated the Due Process Clause of the Fourteenth Amendment by discharging appellee from his job without a formal pretermination or a prompt post-termination hearing.[3] Appellee requested a declaration that his rights had been violated and an award of money damages.

The District Court granted the requested relief for violation of appellee's Fourteenth Amendment rights.[4] The court found that appellee had a property interest in his job and that the procedures followed by appellants to discharge appellee were constitutionally "inadequate" under the Fourteenth Amendment. *Id.*, at 14. Further, the court declared unconstitutional Florida's statutory provisions governing removal of state employees, Fla. Stat. § 110.061 (1977). Finally, the District Court concluded that appellants had forfeited their qualified immunity from suit under § 1983 because appellee's "due process rights were clearly established at the time of his October 24, 1977, dismissal." *Id.*, at 16.

Five days after entry of the District Court's order, the Court of Appeals for the Fifth Circuit decided *Weisbrod* v. *Donigan*, 651 F. 2d 334 (1981). The Court of Appeals there held that Florida officials in 1978 had violated no well-established due process rights in discharging a permanent state employee without a pretermination or a prompt post-termination hearing. On motion for reconsideration, the District Court found that *Weisbrod* required it to vacate its prior holding that appellants had forfeited their immunity by violating appellee's clearly established constitutional rights. The court nevertheless reaffirmed its award of monetary damages. It reasoned that proof that an official had violated clearly established constitutional rights was not the "sole way" to overcome the official's claim of qualified immunity. Applying the "totality of the circumstances" test of *Scheuer* v. *Rhodes*, 416 U. S. 232, 247–248 (1974), the District Court held that "if an official violates his agency's explicit regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable." 543 F. Supp., at 19.[5] In this respect, the court noted that the personnel regulations of the Florida Highway Patrol clearly required "a complete investigation of the charge and an opportunity [for the employee] to respond in writing." *Id.*, at 20.[6] The District Court concluded that appellants in discharging appellee had "followed procedures contrary to the department's rules and regulations"; therefore, appellants were "not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable." *Ibid.* The court explicitly relied upon the official violation of the personnel regulation, stating that "[i]f [the] departmental order had not been adopted . . . prior to [appellee's] dismissal, no damages of any kind could be awarded." *Ibid.* The District Court's order amending the judgment did not discuss the issue whether appellants violated appellee's federal constitutional rights. On that issue, the District Court relied upon its previous opinion; the court did not indicate that the personnel regulation was relevant to its analysis of appellee's rights under the Due Process Clause.

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[2] Appellant Ralph Davis was Executive Director of the Department of Highway Safety and Motor Vehicles at the time of appellee's discharge from employment. Appellant Chester Blakemore succeeded Davis to that position and is a party only in his official capacity. Appellant Col. J. Eldridge Beach is Director of the Florida Highway Patrol, a division of the Department of Highway Safety and Motor Vehicles; as noted above, he held that position at the time of appellee's discharge.

[3] The complaint also alleged that appellants, in violation of the Fourteenth Amendment, had coerced appellee to accept an inadequate settlement and had infringed upon appellee's right of privacy guaranteed by the First and Ninth Amendments.

[4] The District Court rejected appellee's other constitutional claims.

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[5] The District Court relied in part on the reasoning of *Williams* v. *Treen*, 671 F. 2d 892 (CA5 1982), cert. denied, 459 U. S. 1126 (1983), that had held that official conduct in violation of an explicit and clearly established state regulation was *per se* unreasonable. 671 F. 2d, at 899.

[6] These regulations specified in pertinent part:

"Upon receiving a report of . . . a violation of Department or Division rules and regulations . . . , the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions." General Order No. 43, § 1.C (Sept. 1, 1977), quoted in 543 F. Supp., at 19–20.

The District Court also amended its judgment declaring the Florida civil service statute unconstitutional. The State's motion for reconsideration had informed the court that the statute had been repealed by the Florida Legislature. The District Court therefore declared unconstitutional the provisions of the newly enacted civil service statute, Fla. Stat., ch. 110 (1982 and Supp. 1983), insofar as "they fail to provide a prompt post-termination hearing." *Id.*, at 21.

The Court of Appeals affirmed on the basis of the District Court's opinion. *Scherer* v. *Graham*, 710 F. 2d 838 (CA11 1983). We noted probable jurisdiction, 464 U. S. 1017 (1983), to consider whether the Court of Appeals properly had declared the Florida statute unconstitutional and denied appellants' claim of qualified immunity. Appellants do not seek review of the District Court's finding that appellee's constitutional rights were violated. As appellee now concedes that the District Court lacked jurisdiction to adjudicate the constitutionality of the Florida statute enacted in 1981, we consider only the issue of qualified immunity.[7] We reverse.

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[7] The Florida civil service statute now in force replaced the statute under which appellee's employment was terminated. As the current state

## II

In the present posture of this case, the District Court's decision that appellants violated appellee's rights under the Fourteenth Amendment is undisputed.[8] This finding of the District Court—based entirely upon federal constitutional law—resolves the merits of appellee's underlying claim for relief under § 1983. It does not, however, decide the issue of damages. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. The precise standard for determining when an official may assert the qualified immunity defense has been clarified by recent cases, see *Wood* v. *Strickland*, 420 U. S. 308 (1975); *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). The present case requires us to consider the application of the standard where the official's conduct violated a state regulation as well as a provision of the Federal Constitution.

The District Court's analysis of appellants' qualified immunity, written before our decision in *Harlow* v. *Fitzgerald*,

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statute was never applied to appellee, he lacks standing to question its constitutionality. Cf. *Golden* v. *Zwickler*, 394 U. S. 103 (1969).

Appellee's concession does not deprive the Court of appellate jurisdiction over the remaining issue in the case. In cases where the Court of Appeals has declared a state statute unconstitutional, this Court may decide the "Federal questions presented," 28 U. S. C. § 1254(2). Cf. *Flournoy* v. *Wiener*, 321 U. S. 253, 263 (1944); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173 (1979). Under § 1254(2), the Court retains discretion to decline to consider those issues in the case not related to the declaration that the state statute is invalid. In the present case, however, we choose to consider the important question whether the District Court and the Court of Appeals properly denied appellants' good-faith immunity from suit.

[8] As we discuss below, it is contested whether these constitutional rights were clearly established at the time of appellants' conduct.

*supra*, rests upon the "totality of the circumstances" surrounding appellee's separation from his job. This Court applied that standard in *Scheuer* v. *Rhodes*, 416 U. S., at 247–248. As subsequent cases recognized, *Wood* v. *Strickland, supra*, at 322, the "totality of the circumstances" test comprised two separate inquiries: an inquiry into the objective reasonableness of the defendant official's conduct in light of the governing law, and an inquiry into the official's subjective state of mind. *Harlow* v. *Fitzgerald, supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U. S., at 818. Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." *Ibid.*(footnote deleted). No other "circumstances" are relevant to the issue of qualified immunity.

Appellee suggests, however, that the District Court judgment can be reconciled with *Harlow* in two ways. First, appellee urges that the record evinces a violation of constitutional rights that were clearly established. Second, in appellee's view, the District Court correctly found that, absent a violation of clearly established constitutional rights, appellants' violation of the state administrative regulation—although irrelevant to the merits of appellee's underlying constitutional claim—was decisive of the qualified immunity question. In our view, neither submission is consistent with our prior cases.

### A

Appellee contends that the District Court's reliance in its qualified immunity analysis upon the state regulation was "superfluous," Brief for Appellee 19, because the federal constitutional right to a pretermination or a prompt post-termination hearing was well established in the Fifth Circuit at the time of the conduct in question. As the District Court recognized in rejecting appellee's contention, *Weisbrod* v. *Donigan*, 651 F. 2d 334 (CA5 1981), is authoritative precedent to the contrary. The Court of Appeals in that case found that the State had violated no clearly established due process right when it discharged a civil service employee without *any* pretermination hearing.[9]

Nor was it unreasonable in this case, under Fourteenth Amendment due process principles, for the Department to conclude that appellee had been provided with the fundamentals of due process.[10] As stated above, the District Court found that appellee was informed several times of the Department's objection to his second employment and took advantage of several opportunities to present his reasons for believing that he should be permitted to retain his part-time employment despite the contrary rules of the Patrol. Appellee's statement of reasons and other relevant information were before the senior official who made the decision to discharge appellee. And Florida law provided for a full evidentiary hearing after termination. We conclude that the District Court correctly held that appellee has demonstrated no violation of his *clearly established* constitutional rights.

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[9] We see no reason to doubt, as does the partial dissent, that the Court of Appeals in *Weisbrod* had full knowledge of its own precedents and correctly construed them.

[10] As the partial dissent explains at some length, the decisions of this Court by 1978 had required "some kind of a hearing," *Board of Regents* v. *Roth*, 408 U. S. 564, 570, n. 7 (1972), prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. Such a determination would require a careful balancing of the competing interests—of the employee and the State—implicated in the official decision at issue. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). As the Court had considered circumstances in which no hearing at all had been provided prior to termination, *Perry* v. *Sindermann*, 408 U. S. 593 (1972), or in which the requirements of due process were met, *Board of Regents* v. *Roth, supra; Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Bishop* v. *Wood*, 426 U. S. 341 (1976); *Codd* v. *Velger*, 429 U. S. 624 (1977), there had been no occasion to specify any minimally acceptable procedures for termination of employment. The partial dissent cites no case establishing that appellee was entitled to more elaborate notice, or a more formal opportunity to respond, than he in fact received.

### B

Appellee's second ground for affirmance in substance is that upon which the District Court relied. Appellee submits that appellants, by failing to comply with a clear state regulation, forfeited their qualified immunity from suit for violation of federal constitutional rights.

Appellee makes no claim that the appellants' violation of the state regulation either is itself actionable under § 1983 or bears upon the claim of constitutional right that appellee asserts under § 1983.[11] And appellee also recognizes that *Harlow* v. *Fitzgerald* makes immunity available only to officials whose conduct conforms to a standard of "objective legal reasonableness." 457 U. S., at 819. Nonetheless, in appellee's view, official conduct that contravenes a statute or regulation is not "objectively reasonable" because officials fairly may be expected to conform their conduct to such legal norms. Appellee also argues that the lawfulness of official conduct under such a statute or regulation may be determined early in the lawsuit on motion for summary judgment. Appellee urges therefore that a defendant official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions.

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[11] State law may bear upon a claim under the Due Process Clause when the property interests protected by the Fourteenth Amendment are created by state law. See *Board of Regents* v. *Roth*, *supra*, at 577. Appellee's property interest in his job under Florida law is undisputed. Appellee does not contend here that the procedural rules in state law govern the constitutional analysis of what process was due to him under the Fourteenth Amendment.

On its face, appellee's reasoning is not without some force. We decline, however, to adopt it. Even before *Harlow*, our cases had made clear that, under the "objective" component of the good-faith immunity test, "an official would not be held liable in damages under § 1983 unless *the constitutional right he was alleged to have violated* was 'clearly established' at the time of the violation." *Butz* v. *Economou*, 438 U. S., at 498 (emphasis added); accord, *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978). Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.[12]

We acknowledge of course that officials should conform their conduct to applicable statutes and regulations. For that reason, it is an appealing proposition that the violation of such provisions is a circumstance relevant to the official's claim of qualified immunity. But in determining what circumstances a court may consider in deciding claims of qualified immunity, we choose "between the evils inevitable in any available alternative." *Harlow* v. *Fitzgerald*, 457 U. S., at 813–814. Appellee's submission, if adopted, would disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated. See *Butz* v. *Economou*, *supra*, at 506–507; *Harlow* v. *Fitzgerald*, *supra*, at 814, 818–819. Yet, under appellee's submission, officials would be liable in an indeterminate amount for violation of *any* constitutional right—one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation—merely because their official conduct also violated some statute or regulation. And, in § 1983 suits, the issue whether an official enjoyed qualified immunity then might depend upon the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment.

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[12] In *Harlow*, the Court acknowledged that officials may lose their immunity by violating "clearly established statutory . . . rights." 457 U. S., at 818. This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in *Harlow* itself, see *id.*, at 820, n. 36, and as in many § 1983 suits, see, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1 (1980) (holding that § 1983 creates cause of action against state officials for violating federal statutes). For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages. And if a statute or regulation does give rise to a cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages caused by that violation. In the present case, as we have noted, there is no claim that the state regulation itself or the laws that authorized its promulgation create a cause of action for damages or provide the basis for an action brought under § 1983.

*Harlow* was a suit against federal, not state, officials. But our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971). See *Butz* v. *Economou*, 438 U. S., at 504. Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon.

Appellee proposes that his new rule for qualified immunity be limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights. Yet, once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner. Federal judges would be granted large discretion to extract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct,[13] but also for trial courts to decide even frivolous suits without protracted litigation.

Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer* v. *Rhodes*, 416 U. S., at 246.[14]

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[13] Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

[14] Appellee urges as well that appellants' violation of the personnel regulation constituted breach of their "ministerial" duty—established by the regulation—to follow various procedures before terminating appellee's employment. Although the decision to discharge an employee clearly is discretionary, appellee reasons that the Highway Patrol regulation deprived appellants of all discretion in determining what procedures were to be followed prior to discharge. Under this view, the *Harlow* standard is inapposite because this Court's doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial, functions.

Appellee's contention mistakes the scope of the "ministerial duty" exception to qualified immunity in two respects. First, as we have discussed,

## III

A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. As appellee has made no such showing, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), the Court decided that Government officials seeking to establish qualified immunity must show that the acts or omissions violating the plaintiff's rights were objectively reasonable—specifically, that the conduct at issue did not "violate clearly estab-

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breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated. See *supra*, at 193–194, and n. 12.

In any event, the rules that purportedly established appellants' "ministerial" duties in the present case left to appellants a substantial measure of discretion. Cf. *Amy* v. *The Supervisors*, 11 Wall. 136, 138 (1871); *Kendall* v. *Stokes*, 3 How. 87, 98 (1845). Appellants were to determine, for example, what constituted a "complete investigation" and a "thorough study of all information" sufficient to justify a decision to terminate appellee's employment. See n. 6, *supra*. And the District Court's finding that appellants ignored a clear legal command does not bear on the "ministerial" nature of appellants' duties. A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused. Cf. *Kendall* v. *Stokes*, *supra*.

lished statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. The Court today does not purport to change that standard. Yet it holds that, despite discharging a civil service employee in 1977 without meaningful notice and an opportunity to be heard, appellants are entitled to immunity from a suit for damages. The Court reaches this decision essentially by ignoring both the facts of this case and the law relevant to appellants' conduct at the time of the events at issue. In my view, appellants plainly violated appellee's clearly established rights and the Court's conclusion to the contrary seriously dilutes *Harlow*'s careful effort to preserve the availability of damages actions against governmental officials as a critical "avenue for vindication of constitutional guarantees." *Id.*, at 814. Accordingly, I dissent from that portion of the judgment reversing the award of damages.[1]

In order to determine whether a defendant has violated a plaintiff's clearly established rights, it would seem necessary to make two inquiries, both of which are well within a court's familiar province: (1) which particular act or omission of the defendant violated the plaintiff's federal rights, and (2) whether governing case or statutory law would have given a reasonable official cause to know, at the time of the relevant events, that those acts or omissions violated the plaintiff's rights. The Court, however, asks neither question. Its brief treatment of the issue includes no reference to the District Court's findings of fact with respect to the conduct at issue here. This is not surprising since those findings—which were affirmed summarily by the Court of Appeals and which appellants do not claim to be clearly erroneous—demonstrate that appellee was *never* informed that he might be fired for violating regulations against dual employment.

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[1] I agree that the District Court erred in declaring the new Florida civil service statute unconstitutional, see *ante*, at 189, and therefore concur in that portion of the judgment vacating paragraph 2 of the District Court's amended order. See 543 F. Supp. 4, 21 (ND Fla. 1981).

Nor did appellee ever have an opportunity to persuade the relevant decisionmaker that he should not be disciplined.

The regulation appellee was ultimately fired for violating required only that Patrol members receive prior approval of outside employment, in order to avoid conflicts of interest with regular duties. 543 F. Supp. 4, 8 (ND Fla. 1981). Upon request, appellee obtained approval from his troop commander for part-time work as a security guard on a movie set. Some three weeks later, the commander revoked the approval and there followed an exchange of memos between appellee's immediate superiors and the commander indicating that appellee did not wish to relinquish the part-time job. Apparently without informing appellee, the commander then recommended to the director of the Highway Patrol, Col. Beach, that appellee be suspended for three days and, nearly a week later, an intermediate superior ordered appellee to terminate his outside employment. On the same day, appellee wrote to the commander, stating that he did not believe his outside work caused any conflict of interest. Although some officials in the Department suggested to each other ways in which appellee's work might create a conflict, "[n]o one ever identified the conflict to plaintiff; [and the superior who had ordered appellee to terminate the job] testified he didn't know what the conflict was." *Ibid.* Meanwhile, Beach, the official with authority to terminate appellee, received copies of the various letters that had been exchanged and, without informing appellee or soliciting his views, decided to discharge him. As the District Court summarized:

> "By certified letter dated October 24, 1977 and received by plaintiff on October 25, 1977, Scherer was terminated from his FHP employment effective October 20, 1977. At no time prior to the letter of termination was the plaintiff given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the official charged with making the termination decision,

> the defendant Beach. At no time prior to October 25, 1977, was the plaintiff notified of any right that he might have to respond to Col. Beach's letter of dismissal." *Id.*, at 8–9.

The District Court further found that two other Highway Patrol employees in appellee's troop had been given approval to engage in the very same secondary employment for which appellee was fired, and their approval "was never revoked." *Id.*, at 8, n. 1. Moreover, after being terminated, appellee successfully argued before a Florida administrative officer that the regulation prohibiting dual employment had not been validly adopted and was therefore void. *Id.*, at 9. In short, although appellee was warned not to continue the second employment, he had no reason to believe prior to being fired that retention of the second job constituted grounds for termination, and indeed he had several reasons for believing otherwise. Nor did he have any opportunity to challenge, before the relevant decisionmaker, either his termination or the underlying conclusion that his retention of the second job created a conflict of interest.

By failing to warn appellee that his conduct could result in deprivation of his protected property interest in his Highway Patrol job and by denying him an opportunity to challenge that deprivation, appellants violated the most fundamental requirements of due process of law—meaningful notice and a reasonable opportunity to be heard. Contrary to the Court's conclusion, these requirements were "clearly established" long before October 25, 1977, the date on which appellee learned he was fired. As long ago as 1914, the Court emphasized that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394. In 1925, the Court explained that a government failure to afford reasonable notice of the kinds of conduct that will result in deprivations of liberty and property "violates the first essential of due process of law." *Connally*

v. *General Construction Co.*, 269 U. S. 385, 391. And in several decisions in the 1950's, the Court concluded that public employees have interests in maintaining their jobs that cannot be abridged without due process. *E. g.*, *Slochower* v. *Board of Education*, 350 U. S. 551 (1956); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); see *Board of Regents* v. *Roth*, 408 U. S. 564, 576–577 (1972).

In January 1972, nearly six years prior to appellee's termination, the Court reaffirmed that

> "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U. S. 371, 379. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' *Bell* v. *Burson*, 402 U. S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not not be preceded by opportunity for some kind of hearing, see, *e. g.*, *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Phillips* v. *Commissioner*, 283 U. S. 589, 597; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594." *Board of Regents* v. *Roth*, *supra*, at 570, n. 7.

Similarly, in 1974, based on an exhaustive review of our cases, JUSTICE WHITE explained that "where there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State in the administration of its law, that a person be given notice and a hearing before he is finally discharged." *Arnett* v. *Kennedy*, 416 U. S. 134, 185 (concurring in part and dissenting in part). See *id.*, at 170 (opinion of POWELL, J.,); *id.*, at 203 (Douglas, J., dissenting); *id.*, at 212–227 (MARSHALL, J., dissenting). And finally, in February 1976, more than a year and a half prior to appellee's termination, JUSTICE POWELL summarized for the Court fundamental legal principles whose sources could be traced to cases from the 19th century:

> "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . . This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974). See, *e. g.*, *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931). See also *Dent* v. *West Virginia*, 129 U. S. 114, 124–125 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914)." *Mathews* v. *Eldridge*, 424 U. S. 319, 332–333 (1976).

See also *Goss* v. *Lopez*, 419 U. S. 565 (1975); *Perry* v. *Sindermann*, 408 U. S. 593 (1972); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Connell* v. *Higginbotham*, 403 U. S. 207 (1971) *(per curiam);*

*Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969).

If there were any ambiguity in the repeated pronouncements of this Court, appellants had several other reasons to know that their failure to afford appellee meaningful pretermination notice and hearing violated due process. Two years prior to appellee's discharge, the Florida Attorney General explained in an official opinion that "[c]areer service employees who have attained permanent status in the career service system have acquired a property interest in their public positions and emoluments thereof—such as job security and seniority which they may not be deprived of without due process of law." Fla. Op. Atty. Gen. 075–94, p. 161 (1975). And more than a year before the events at issue here, in a case involving the Jacksonville, Fla., City Civil Service Board, the Court of Appeals for the Fifth Circuit left no doubt as to what it thought "clearly established" law required:

> "Where a governmental employer chooses to postpone the opportunity of a nonprobationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision." *Thurston* v. *Dekle,* 531 F. 2d 1264, 1273 (1976), vacated and remanded on other grounds, 438 U. S. 901 (1978).

Finally, some two months prior to appellee's discharge, the Florida Highway Patrol issued a regulation undoubtedly intended to conform administrative practice with decisions like

*Thurston.*[2] The regulation, which has the force of statutory law, see 543 F. Supp., at 20, provides in pertinent part:

> "Upon receiving a report of . . . a violation of Department or Division rules and regulations . . . the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions." General Order No. 43, §1.C (Sept. 1, 1977), quoted in 543 F. Supp., at 19–20.

The Court ignores most of this evidence demonstrating the objective unreasonableness of appellants' conduct. Instead, the Court relies first on *Weisbrod* v. *Donigan*, 651 F. 2d 334 (CA5 1981) *(per curiam)*, as "authoritative precedent" for the proposition that appellee's right to pretermination notice and a hearing was not "well established in the Fifth Circuit at the time of the conduct in question." *Ante*, at 192. In *Weisbrod*, the Court of Appeals simply declared—without citation to any of the cases just discussed, including its own decision in *Thurston*—that "the record indicates defendants did not act in disregard of any well-settled constitutional rights" and that "Weisbrod offers no authority indicating the failure to hold a pretermination hearing and the delay in the process of her administrative appeal were clear violations of her constitutional rights." 651 F. 2d, at 336. It is unclear from the court's brief *per curiam* opinion whether Weisbrod—unlike appellee in this case—was informed prior to discharge that her conduct constituted grounds for termination. See *id.*, at 335. In any event, the Court of Appeals' dubious and cursory *ipse dixit* in *Weisbrod*, rendered four years after the conduct at issue in this case, is hardly persuasive, much less controlling, authority for this Court's decision that appellee's rights were not clearly established in 1977.

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[2] Because I believe appellants were not entitled to qualified immunity under the standards set forth in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), I need not consider whether, as appellee contends, violation of the department regulation would defeat immunity for violating federal rights of which the officials had no reasonable knowledge. It seems plain to me, however, that the existence of the regulation is relevant to the *Harlow* analysis. Regardless of whether this Court or the Court of Appeals now thinks appellee's right to pretermination notice and hearing was not "clearly established" in 1977, the presence of a clear-cut regulation obviously intended to safeguard public employees' constitutional rights certainly suggests that appellants had reason to believe they were depriving appellee of due process. Cf. *Harlow*, *supra*, at 821 (BRENNAN, J., concurring). Such an objective basis of knowledge provides at least as reliable a measure of the reasonableness of official action as does a court's *post hoc* parsing of cases. See 457 U. S., at 815–819.

The other basis for the Court's rejection of appellee's claim is an assertion that it was not "unreasonable in this case, under Fourteenth Amendment principles, for the Department to conclude that appellee had been provided with the fundamentals of due process." *Ante*, at 192. The Court seeks to support this statement by relying on the fact that appellee had been told to discontinue his second job and that he "took advantage of several opportunities to present his reasons for believing that he should be permitted to retain his part-time employment . . . ." *Ibid.* Appellee did not, however, have an opportunity to present his reasons for retaining his civil service job with the Florida Highway Patrol—the employment in which he had a protected property interest. See 543 F. Supp., at 12. Indeed, he was, according to the District Court, never told that his Highway Patrol job was in jeopardy, and he never had a chance to try to persuade the relevant decisionmaker that the second job did not create a conflict of interest. The Court concedes that our decisions by 1978 had required notice and "'some kind of a hearing' . . .

prior to discharge of an employee who had a constitutionally protected property interest in his employment." *Ante*, at 192, n. 10. In this case, appellee received *no* meaningful notice and *no* kind of hearing before the official who fired him.

In sum, I believe that appellants' actions "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U. S., at 818, and I would therefore affirm the District Court's award of damages.

# SECURITIES INDUSTRY ASSOCIATION *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 83–614. Argued April 24, 1984—Decided June 28, 1984

BankAmerica Corp. (BAC), a bank holding company, applied to the Federal Reserve Board (Board) for approval under § 4(c)(8) of the Bank Holding Company Act of 1956 (BHC Act) to acquire a nonbanking affiliate corporation (Schwab) engaged in retail securities brokerage. Section 4(c)(8) authorizes bank holding companies, with prior Board approval, to acquire stock in other companies that are engaged in nonbanking activities that the Board determines are "so closely related to banking . . . as to be a proper incident thereto." Petitioner, a national trade association of securities brokers, opposed BAC's application and participated in the administrative hearings. The Board authorized BAC to acquire Schwab, holding that a securities business, such as Schwab, that is essentially confined to the purchase and sale of securities for the account of third parties, without providing investment advice to the purchaser or seller, is "closely related" to banking within the meaning of § 4(c)(8). The Board also concluded that the acquisition would not violate § 20 of the Glass-Steagall Act, which prohibits a bank (BAC's banking subsidiary here) from being affiliated with companies "engaged principally in the issue, flotation, underwriting, public sale, or distribution" of securities. On petitioner's application for judicial review, the Court of Appeals affirmed the Board's order.

*Held:* The Board has authority under § 4(c)(8) of the BHC Act to authorize a bank holding company to acquire a nonbanking affiliate engaged principally in retail securities brokerage. Pp. 214–221.

(a) The Board's determination that a securities brokerage business that is essentially limited to the purchase and sale of securities for the account of customers, and without provision of investment advice to purchaser or seller, is "closely related" to banking, is consistent with the language and policies of the BHC Act. There is no express requirement in § 4(c)(8) that a proposed activity must facilitate other banking operations before it may be found to be "closely related" to banking. The record substantially supports the Board's factual findings that Schwab's brokerage services were very similar to the types of services that are generally provided by banks and that banks are particularly well equipped to provide such services. Pp. 214–216.

(b) The Board's determination that a bank holding company's acquisition of such a brokerage business as Schwab's is not prohibited by § 20 of the Glass-Steagall Act, is reasonable and supported by the statute's plain language and legislative history, and deserves the deference normally accorded the Board's construction of the banking laws. The term "public sale" in § 20 should be read to refer to the underwriting activity described by the terms that surround it, and to exclude the type of retail brokerage business in which Schwab principally was engaged. This reading of the statute is further supported by the Board's similar longstanding interpretation of identical language found in another provision of the Glass-Steagall Act. Moreover, the legislative history demonstrates that Congress enacted § 20 to prohibit the affiliation of commercial banks with entities that are engaged principally in activities such as underwriting. None of the hazards of underwriting is implicated by Schwab's brokerage activities. Pp. 216–221.

716 F. 2d 92, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

*James B. Weidner* argued the cause for petitioner. With him on the briefs were *John M. Liftin*, *David A. Schulz*, *William J. Fitzpatrick*, and *Donald J. Crawford*.

*Carter G. Phillips* argued the cause for respondents. With him on the brief for the federal respondents were *Solicitor General Lee* and *Deputy Solicitor General Claiborne*. *Arnold M. Lerman*, *Andrea Timko Sallet*, and *H. Helmut Loring* filed a brief for respondent BankAmerica Corp.*

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the Federal Reserve Board has statutory authority under § 4(c)(8) of the Bank Holding Company Act of 1956, 12 U. S. C. § 1843(c)(8), to authorize a bank holding company to acquire a nonbanking affiliate engaged principally in retail securities brokerage.

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*Briefs of *amici curiae* urging affirmance were filed for the American Bankers Association et al. by *Robert S. Rifkind;* and for the Legal Foundation of America by *David Crump*.

## I

BankAmerica Corp. (BAC) is a bank holding company within the meaning of the Bank Holding Company Act.[1] In March 1982, BAC applied to the Federal Reserve Board (Board) for approval under § 4(c)(8) of the Act to acquire 100 percent of the voting shares of The Charles Schwab Corp., a company that engages through its wholly owned subsidiary, Charles Schwab & Co. (Schwab), in retail discount brokerage.[2] The Board ordered that formal public hearings be held before an Administrative Law Judge (ALJ) to consider the application. The Securities Industry Association (SIA), a national trade association of securities brokers, and petitioner here, opposed BAC's application and participated in those hearings.[3] After six days of hearings, the ALJ recommended that BAC's application be approved. After reviewing the evidentiary record, the Board adopted, with modifications, the findings and conclusions of the ALJ and authorized BAC to acquire Schwab. 69 Fed. Res. Bull. 105 (1983). SIA petitioned the Court of Appeals for the Second Circuit for judicial review under 12 U. S. C. § 1848.

The Court of Appeals held that the Board had acted within its statutory authority in authorizing BAC's acquisition of Schwab under § 4(c)(8) of the BHC Act. The court accordingly affirmed the Board's order. 716 F. 2d 92 (1983). We granted SIA's petition for certiorari, 465 U. S. 1004 (1984), and now affirm.

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[1] BAC operates one subsidiary bank, Bank of America. That bank is a member of the Federal Reserve System, and the parties inform us that it is the largest commercial bank in the United States.

[2] Schwab is known as a "discount" broker because of the low commissions it charges. Schwab can afford to charge lower commissions than full-service brokerage firms because it does not provide investment advice or analysis, but merely executes the purchase and sell orders placed by its customers.

[3] In addition to BAC, the Justice Department participated in the hearing as a proponent of the proposed acquisition.

## II

Section 4 of the Bank Holding Company Act (BHC Act) prohibits the acquisition by bank holding companies of the voting shares of nonbanking entities unless the acquisition is specifically exempted. The principal exemption to that prohibition is found in § 4(c)(8). That provision authorizes bank holding companies, with prior Board approval, to engage in nonbanking activities that the Board determines are "so closely related to banking . . . as to be a proper incident thereto." 12 U. S. C. § 1843(c)(8).[4]

Application of the § 4(c)(8) exception requires the Board to make two separate determinations. First, the Board must determine whether the proposed activity is "closely related" to banking.[5] If it is, the Board may amend its regulations to include the activity as a permissible nonbanking activity.[6] Next, the Board must determine on a case-by-case basis whether allowing the applicant bank holding company to engage in the activity reasonably may be expected to produce public benefits that outweigh any potential adverse effects. H. R. Conf. Rep. No. 91–1747, pp. 16–18 (1970).[7]

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[4] Section 4(c)(8) provides that the general ban on the ownership by a bank holding company of shares in any company other than a bank shall not apply to:

"(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto . . . . In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." 12 U. S. C. § 1843(c)(8).

[5] In making this determination, the Board generally has followed the guidelines announced in *National Courier Assn.* v. *Board of Governors*, 170 U. S. App. D. C. 301, 516 F. 2d 1229 (1975). That case held that an activity is "closely related" to banking within the meaning of § 4(c)(8) if any one of the following is demonstrated:

"1. Banks generally have in fact provided the proposed services.

"2. Banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed service.

### A

In this case, the Board held that the securities brokerage services offered by Schwab were "closely related" to banking within the meaning of § 4(c)(8). Relying on record evidence and its own banking expertise, the Board articulated the ways in which the brokerage activities provided by Schwab were similar to banking. The Board found that banks currently offer, as an accommodation to their customers, brokerage services that are virtually identical to the services

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"3. Banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form." *Id.*, at 313, 516 F. 2d, at 1237.

The Board has recognized, however, that the *National Courier* guidelines do not provide the exclusive basis for finding that an activity is "closely related" to banking, and has stated that it will consider "any . . . factor that an applicant may advance to demonstrate a reasonable or close connection or relationship of the activity to banking." 49 Fed. Reg. 806 (1984).

[6] See 12 CFR § 225 (1983) ("Regulation Y"). Section 225.4 of Regulation Y contains a list of those activities already determined by the Board to be "closely related" to banking.

[7] When a bank holding company applies for approval to engage in an activity already listed in Regulation Y, the application generally will be acted on by a Reserve Bank under delegated authority from the Board. 49 Fed. Reg. 815 (1984). In acting on the application, the Reserve Bank need determine only that the public benefits that are likely to result from the applicant's proposal will outweigh the possible adverse effects. If, as in this case, an application involves a currently unlisted activity, it must be considered by the Board itself. In that case, the Board must make both of the determinations described above before approving the application.

offered by Schwab. 69 Fed. Res. Bull., at 107.[8] Moreover, the Board cited a 1977 study by the Securities and Exchange Commission that found that

> "bank trust department trading desks, at least at the largest banks, perform the same functions, utilize the same execution techniques, employ personnel with the same general training and expertise, and use the same facilities . . . that brokers do." *Ibid.*

Finally, the Board concluded that the use by banks of "sophisticated techniques and resources" to execute purchase and sell orders for the account of their customers was sufficiently widespread to justify a finding that banks generally are equipped to offer the type of retail brokerage services provided by Schwab. *Id.*, at 108. On the basis of these findings, the Board held that a securities brokerage business that is "essentially confined to the purchase and sale of securities for the account of third parties, and without the provision of investment advice to the purchaser or seller" is "closely related" to banking within the meaning of § 4(c)(8) of the BHC Act. *Id.*, at 117.[9]

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[8] The Board conceded that banks, unlike retail brokers, use an intervening broker to execute orders for the purchase and sale of securities traded on an exchange. The Board found, however, that banks often execute purchase and sell orders for securities that are not traded on an exchange without an intervening broker. To this extent they perform the same services as a retail broker. 69 Fed. Res. Bull., at 107.

[9] The Board, after notice and comment, subsequently amended Regulation Y to include the securities brokerage business at issue here in the list of permissible nonbanking activities. See 48 Fed. Reg. 7746 (1983) (proposed amendment published for comment); 48 Fed. Reg. 37003 (1983) (final regulation amending 12 CFR § 225.4). The final amendment to Regulation Y added as a permissible nonbanking activity:

"(15) providing securities brokerage services, related securities credit activities pursuant to the Board's Regulation T (12 CFR Part 220), and incidental activities such as offering custodial services, individual retirement accounts, and cash management services, *provided* that the securities brokerage services are restricted to buying and selling securities solely as

### B

The Board next determined that the public benefits likely to result from BAC's acquisition of Schwab outweighed the possible adverse effects. Specifically, the Board identified as public benefits the increased competition and the increased convenience and efficiencies that the acquisition would bring to the retail brokerage business. *Id.*, at 109–110. As to possible adverse effects, the Board determined that the proposed acquisition would not result in the undue concentration of resources, decreased competition, or unfair competitive prices. *Id.*, at 110–114.

Finally, the Board concluded that BAC's acquisition of Schwab was not prohibited by the Glass-Steagall Act.[10] *Id.*, at 114–116. The Board observed that the proposed acquisition would make Schwab an affiliate of BAC's banking subsidiary and thus subject to the provisions of the Glass-Steagall Act. It held, however, that Schwab was "not engaged principally in any of the activities prohibited to member bank affiliates by the Glass-Steagall Act," and thus concluded that the acquisition was "consistent with the letter and spirit of that act." *Id.*, at 114.

SIA challenges the Board's order in this case on two grounds. First, it argues that the Board may not approve an activity as "closely related" to banking unless it finds that the activity will facilitate other banking operations. Second, it argues that § 20 of the Glass-Steagall Act, 12 U. S. C. § 377, prohibits a bank holding company from owning any entity that is engaged principally in retail securities brokerage and thus that the Board lacked statutory authority under § 4(c)(8) to approve BAC's acquisition of Schwab.[11]

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agent for the account of customers and do not include securities underwriting or dealing or investment advice or research services." 48 Fed. Reg. 37006 (1983) (emphasis in original).

[10] The Glass-Steagall Act was enacted as part of the Banking Act of 1933.

[11] In proceedings before the Court of Appeals, SIA apparently challenged the Board's public benefit analysis as well. See 716 F. 2d 92, 103–104 (CA2 1983). SIA, however, has not advanced that argument here.

## III

### A

There is no express requirement in § 4(c)(8) that a proposed activity must facilitate other banking operations before it may be found to be "closely related" to banking. Indeed, the relevant statutory language does not specify any factors that the Board must consider in making that determination. The general nature of the statutory language, therefore, suggests that Congress vested the Board with considerable discretion to consider and weigh a variety of factors in determining whether an activity is "closely related" to banking. In this case, the Board concluded that Schwab's brokerage services were "closely related" to banking because it found that the services were "operationally and functionally very similar to the types of brokerage services that are generally provided by banks and that banking organizations are particularly well equipped to provide such services." 69 Fed. Res. Bull., at 107.[12] The Board acted well within its discretion in ruling on

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[12] SIA argues that the legislative history of the 1970 amendment to § 4(c)(8) establishes that Congress expressly rejected a "functionally related" standard, and that the Board exceeded its statutory authority by relying on that standard here. This argument is without merit. In 1970, the initial versions of both the House and Senate bills changed the "closely related" test of § 4(c)(8) to a "functionally related" test. S. Rep. No. 91-1084, p. 25 (1970); H. R. Rep. No. 91-387, p. 1 (1969). The Conference Committee, however, retained the "closely related" language of the prior Act in the final version of the bill. H. R. Conf. Rep. No. 91-1747, p. 5 (1970). As we observed in *Board of Governors of Federal Reserve System* v. *Investment Company Institute*, 450 U. S. 46, 73 (1981), the significance of this legislative history is unclear. It is, however, clear that the 1970 amendment broadened rather than restricted the Board's discretion to determine whether nonbanking activities are significantly related to banking. See *id.*, at 72–76. Thus, there is no indication that Congress intended to preclude consideration by the Board of the functional relationship of nonbanking activities to banking in determining whether those activities may qualify for the § 4(c)(8) exemption.

Moreover, it is not clear that the Board in this case applied the "functionally related" test arguably rejected by Congress in 1970. The Board found such factors. Moreover, the Board's factual findings are substantially supported by the record.

Banks long have arranged the purchase and sale of securities as an accommodation to their customers. Congress expressly endorsed this traditional banking service in 1933. Section 16 of the Glass-Steagall Act authorizes banks to continue the practice of "purchasing and selling . . . securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for [their] own account[s]." 12 U. S. C. § 24 Seventh.[13] The Board found that in substance the brokerage services that Schwab performs for its customers are not significantly different from those that banks, under the authority of § 16, have been performing for their own customers for years. See 69 Fed. Res. Bull., at 107–109. Moreover, the amendment to Regulation Y, added by the Board in 1983 to reflect its decision in this case, expressly limits the securities brokerage services in which a bank may engage "to buying and selling securities solely as agent for the account of customers" and does not authorize "securities underwriting or dealing or investment advice or research services." 48 Fed. Reg. 37006 (1983).[14]

Congress has committed to the Board the primary responsibility for administering the BHC Act. Accordingly, the Board's determination of what activities are "closely related" to banking within the meaning of § 4(c)(8) "is entitled to the

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that Schwab's brokerage business was both "operationally and functionally very similar to" traditional banking services and that banks were well equipped to provide those services. 69 Fed. Res. Bull., at 107.

[13] See S. Rep. No. 77, 73d Cong., 1st Sess., 16 (1933) (explaining that § 16 was intended to permit banks "to purchase and sell investment securities for their customers to the same extent as heretofore").

[14] See n. 9, *supra*. Schwab also provides some incidental services to its customers such as margin lending, custodial accounts, and appropriate account maintenance. The Board also approved these as "closely related" to banking when offered incident to the approved brokerage services. See 69 Fed. Res. Bull., at 108–109. SIA has not challenged the Board's conclusions with respect to these incidental services.

greatest deference." *Board of Governors of Federal Reserve System* v. *Investment Company Institute,* 450 U. S. 46, 56 (1981) *(ICI).* In this case, the Board has articulated with commendable thoroughness the ways in which banking activities are similar to the brokerage activities at issue here. The standard the Board used to determine that Schwab's brokerage business is "closely related" to banking is reasonable and supported by a normal reading of the statutory language of § 4(c)(8). The factual findings to which this standard was applied are substantially supported by the record. The Court of Appeals, therefore, properly deferred to the Board's determination in this case.

### B

The Board expressly considered and rejected SIA's argument that BAC's acquisition of Schwab violates the Glass-Steagall Act. That Act comprises four sections of the Banking Act of 1933.[15] Only one of those four sections is applicable here. That provision, § 20, as set forth in 12 U. S. C. § 377, provides in relevant part:

> "[N]o member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization *engaged principally in the issue, flotation, underwriting, public sale, or distribution* at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities . . ." (emphasis added).

A bank holding company's subsidiaries are bank affiliates within the meaning of § 20. 12 U. S. C. § 221a(b). Section 20, therefore, prohibits BAC's proposed acquisition if Schwab is "engaged principally" in any of the activities listed therein.

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[15] Those four sections are §§ 16, 20, 21, and 32, codified respectively at 12 U. S. C. §§ 24, 377, 378, and 78.

SIA concedes that Schwab is not engaged in the "issue, flotation, underwriting, . . . or distribution" of securities. It argues, however, that the term "public sale" of securities as used in § 20 applies to Schwab's brokerage business. The Board rejected this argument, holding that "Schwab is not engaged principally in any of the activities prohibited to member bank affiliates by the Glass-Steagall Act." 69 Fed. Res. Bull., at 114. The Board has broad power to regulate and supervise bank holding companies and banks that are members of the Federal Reserve System. In this respect, the Board has primary responsibility for implementing the Glass-Steagall Act, and we accord substantial deference to the Board's interpretation of that Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent. *ICI, supra,* at 68; *Investment Company Institute* v. *Camp,* 401 U. S. 617, 626–627 (1971).[16]

"Public sale" is used in conjunction with the terms "issue," "flotation," "underwriting," and "distribution" of securities. None of these terms has any relevance to the brokerage business at issue in this case. Schwab does not engage in issuing or floating the sale of securities, and the terms "underwriting" and "distribution" traditionally apply to a function distinctly different from that of a securities broker.[17] An underwriter normally acts as principal whereas a broker executes orders for the purchase or sale of securities solely as agent.[18] Under the "familiar principle of statutory construction that words grouped in a list should be given related meaning," *Third National Bank* v. *Impac, Ltd.*, 432 U. S. 312, 322 (1977) (footnote omitted), the term "public sale" in § 20 should be read to refer to the underwriting activity described by the terms that surround it, and to exclude the type of retail brokerage business in which Schwab principally is engaged.

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[16] Such deference is appropriate where, as here, the Board expressly addressed the application of the Glass-Steagall Act to the proposed regulatory action and determined that the proposed action implicated none of the concerns that led to the enactment of that Act. See *ICI,* 450 U. S., at 68. In *Camp,* on the other hand, we gave less deference to regulatory action that was taken without any "expressly articulated position at the administrative level as to the meaning and impact of the provisions of [the Glass-Steagall Act]." 401 U. S., at 627. We held in *Camp* that agency action taken "without opinion or accompanying statement" was "hardly tantamount to an administrative interpretation" of the Glass-Steagall Act, and was not due the deference normally accorded such regulatory action. *Id.,* at 627–628.

[17] In the typical distribution of securities, an underwriter purchases securities from an issuer, frequently in association with other underwrit-

This reading of the statute is further supported by the Board's longstanding interpretation of identical language found in § 32 of the Glass-Steagall Act, 12 U. S. C. § 78. That section prohibits interlocking management or employment between banks and any entity "primarily engaged in the *issue, flotation, underwriting, public sale, or distribution,* at wholesale or retail, or through syndicate participation" of securities. 12 U. S. C. § 78 (emphasis added).[19] In

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ers. The distribution of these securities to the public may be effected by the underwriters alone, or in conjunction with a group of dealers who also purchase and sell the particular issue of securities as principals. Underwriters also may distribute securities under a "best efforts" agreement pursuant to which large blocks of specific issues of securities are offered to the public by the investment banker as agent for the issuer. A "best efforts" distribution is not technically an underwriting. 1 L. Loss, Securities Regulations 172 (2d ed. 1961). Because Schwab's brokerage business involves none of these distribution plans, we need not consider whether a "best efforts" distribution is prohibited under § 20.

[18] Most securities firms engage in all aspects of the securities business, acting at various times as underwriters, dealers, or brokers. As underwriter and dealer, the firm buys and sells securities on its own account thereby assuming all risk of loss. As broker, the firm buys and sells securities as an agent for the account of customers. In these transactions, it is the customer, rather than the securities firm, who bears the risk of loss. Schwab is different from most securities firms in that it engages solely in the brokerage business and does not participate in underwriting or dealing in securities.

[19] Section 32 provides in relevant part:

"No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or

January 1936, the Board interpreted the list of prohibited activities described in § 32 to exclude the kind of brokerage activities at issue here. Specifically, the Board ruled that

> "[a] broker who is engaged solely in executing orders for the purchase and sale of securities on behalf of others in the open market is not engaged in the business referred to in section 32." 22 Fed. Res. Bull. 51, n. 1 (1936).

Because §§ 32 and 20 contain identical language, were enacted for similar purposes, and are part of the same statute, the long-accepted interpretation of the term "public sale" to exclude brokerage services such as those offered by Schwab should apply as well to § 20.[20] The Board's interpretation of the disputed term is supported by the plain language of the statute. It is also entirely consistent with legislative intent.

The legislative history demonstrates that Congress enacted § 20 to prohibit the affiliation of commercial banks with entities that were engaged principally in "activities such as underwriting." *ICI*, 450 U. S., at 64; see *Camp*, *supra*, at 630–634. In 1933, Congress believed that the heavy involve-

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distribution, at wholesale or retail, or through syndicated participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank . . . ." 12 U. S. C. § 78.

[20] SIA argues that the phrase in § 16 that allows banks to engage in "purchasing and selling . . . securities and stock, without recourse, solely upon the order, and for the account of, customers" is essentially equivalent to the term in § 20 that prohibits the "public sale" of securities. This argument is unpersuasive. There is no basis for assuming that the dissimilar phrases found in §§ 16 and 20 are coterminous. The permissive phrase found in § 16 accurately describes securities brokerage and clearly distinguishes that activity from the activities of "dealing in, underwriting and purchasing for its own account investment securities" that are prohibited elsewhere in that section. Section 20 also prohibits bank affiliates from engaging in these latter activities. The description of securities brokerage found in § 16, however, appears nowhere in § 20.

Moreover, § 16 applies only to banks, not to bank holding companies, and is not applicable here. Thus, we have no occasion to determine whether § 16 would permit banks to engage in brokerage activity on the behalf of the general public as well as for their own customers.

ment of commercial banks in underwriting and securities speculation had precipitated "the widespread bank closings that occurred during the Great Depression." *ICI*, *supra*, at 61. One of the most serious threats to sound commercial banking perceived by Congress was the existence of "bank affiliates" that "devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock often largely with the resources of the parent bank." S. Rep. No. 77, 73d Cong., 1st Sess., 10 (1933).[21]

Congressional concern over the underwriting activities of bank affiliates included both the fear that bank funds would be lost in speculative investments and the suspicion that the more "subtle hazards" associated with underwriting would encourage unsound banking practices. See *Camp*, 401 U. S., at 630.[22] None of the more "subtle hazards" of underwriting identified in *Camp* is implicated by the brokerage activities at issue here.[23] Because Schwab trades only as agent, its assets are not subject to the vagaries of the securities markets. Moreover, Schwab's profits depend solely on the volume of shares it trades and not on the purchase or sale of particular securities. Thus, BAC has no "salesman's stake" in the securities Schwab trades. It cannot increase

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[21] See Hearings pursuant to S. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess., 1052–1068 (1931).

[22] We held in that case:

"The legislative history of the Glass-Steagall Act shows that Congress also had in mind and repeatedly focused on the more subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary or managing agent and enters the investment banking business either directly or by establishing an affiliate to hold and sell particular investments." 401 U. S., at 630.

[23] See *Camp*, 401 U. S., at 631–634 (identifying the "subtle hazards" of affiliation with underwriting firms). All these "subtle hazards" are attributable to the promotional pressures that arise from affiliation with entities that purchase and sell particular investments on their own account.

Schwab's profitability by having its bank affiliate extend credit to issuers of particular securities, nor by encouraging the bank affiliate improperly to favor particular securities in the management of depositors' assets. Finally, the fact that § 16 of the Glass-Steagall Act allows banks to engage directly in the kind of brokerage services at issue here, to accommodate its customers, suggests that the activity was not the sort that concerned Congress in its effort to secure the Nation's banks from the risks of the securities market.

In sum, we see no reason to disturb the Board's determination that "the business of purchasing or selling securities upon the unsolicited order of, and as agent for, a particular customer does not constitute the 'public sale' of securities for purposes of section 20." 69 Fed. Res. Bull., at 114. This interpretation of the Glass-Steagall Act is reasonable, consistent with the plain language of the statute and its legislative history, and deserves the deference normally accorded the Board's construction of the banking laws.

## IV

The Board determined in this case that a securities brokerage business that is essentially limited to the purchase and sale of securities for the account of customers, and without provision of investment advice to purchaser or seller, is "closely related" to banking. We hold that the Board's determination is consistent with the language and policies of the BHC Act. We also hold that the Board's determination that the Glass-Steagall Act permits bank holding companies to acquire firms engaged in such a brokerage business is reasonable and supported by the plain language and legislative history of the Act. We therefore affirm the judgment of the Court of Appeals.

*It is so ordered.*

# REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WALD ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83-436. Argued April 24, 1984—Decided June 28, 1984

Treasury Department Regulation 201(b), first promulgated in 1963 as part of the Cuban Assets Control Regulations, prohibits any transaction involving property in which Cuba, or any national thereof, has "any interest of any nature whatsoever, direct or indirect." Regulation 560, which was added to the Regulations in 1977, embodied a general license permitting, for the most part, travel-related economic transactions with Cuba, thus exempting such transactions from Regulation 201(b)'s broad prohibition. But in 1982, Regulation 560 was amended to curtail such general license by permitting only certain types of travel, such as official visits, news gathering, and visits to close relatives, and excluding general tourist and business travel. At the time Regulation 201(b) was promulgated, § 5(b) of the Trading With the Enemy Act (TWEA) gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war. The Cuban Assets Control Regulations constitute such an embargo. Section 5(b) was amended in 1977 to limit the President's power under the TWEA to times of war, but at the same time the International Emergency Economic Powers Act (IEEPA) was enacted to cover the President's exercise of emergency economic powers in reponse to peacetime crises, § 203 of that Act granting essentially the same authorities to the President as those in § 5(b) of TWEA. However, rather than requiring the President to declare a new national emergency in order to continue existing economic embargoes, such as that against Cuba, Congress enacted a grandfather clause providing that notwithstanding the amendment to TWEA, the "authorities conferred upon the President" by § 5(b), which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, "may continue to be exercised." Respondents, American citizens who are inhibited from traveling to Cuba by Regulation 201(b), brought an action in Federal District Court, challenging the 1982 amendment to Regulation 560 and seeking a preliminary injunction against its enforcement. The District Court refused to issue the injunction on the ground that respondents had not demonstrated a substantial likelihood of success on the merits. The Court of

Appeals, holding that the challenged amendment lacked statutory authority, vacated the District Court's order and remanded with instructions to issue the injunction.

*Held:*

1. The grandfathered authorities of § 5(b) of TWEA provide an adequate statutory basis for the challenged 1982 amendment to Regulation 560. Pp. 232–240.

(a) The language of the grandfather clause, read in conjunction with § 5(b), supports the conclusion that, in the relevant sense, the "authority" to regulate all property transactions with Cuba, including travel-related transactions, was being exercised on July 1, 1977, and was, therefore preserved. Since the authority to regulate travel-related transactions was among the "authorities conferred upon the President" by § 5(b) that were "being exercised" with respect to Cuba on July 1, 1977, it follows from a natural reading of the grandfather clause that the authority to regulate such transactions "may continue to be exercised" with respect to Cuba after that date. And since the President's authority under § 5(b) to regulate by means of licenses includes the authority to "prevent or prohibit" as well as the authority to "direct and compel," it also follows that the grandfather clause constitutes adequate statutory authority for the 1982 amendment of Regulation 560, the practical effect of which was to prevent travel to Cuba. Pp. 232–236.

(b) Neither the legislative history of the grandfather clause nor its purpose of keeping IEEPA and the amendments to TWEA from being too controversial supports the view that Congress meant to grandfather only those restrictions actually in place on July 1, 1977. Eliminating the President's authority to modify existing licenses in response to heightened tensions with Cuba would have sparked just the sort of controversy the grandfather clause was designed to avoid. Pp. 236–240.

2. The restrictions on travel-related transactions with Cuba imposed by the 1982 amendment to Regulation 560 do not violate the freedom to travel protected by the Due Process Clause of the Fifth Amendment. Cf. *Zemel* v. *Rusk*, 381 U. S. 1. Given the traditional deference to executive judgment in the realm of foreign policy, there is an adequate basis under the Due Process Clause to sustain the President's decision to curtail, by restricting travel, the flow of hard currency to Cuba that could be used in support of Cuban adventurism. Pp. 240–243.

708 F. 2d 794, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and POWELL, JJ., joined, *post*, p. 244. POWELL, J., filed a dissenting opinion, *post*, p. 262.

*Deputy Solicitor General Bator* argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Carolyn F. Corwin*, *Michael F. Hertz*, and *Davis R. Robinson*.

*Leonard B. Boudin* argued the cause for respondents. With him on the brief were *Eric Lieberman*, *Charles S. Sims*, *Burt Neuborne*, *Michael Ratner*, *Jules Lobel*, and *Harold A. Mayerson*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are American citizens who want to travel to Cuba. They are inhibited from doing so by a Treasury Department regulation, first promulgated in 1963, which prohibits any transaction involving property in which Cuba, or any national thereof, has "any interest of any nature whatsoever, direct or indirect." 31 CFR § 515.201(b) (1983) (Regulation 201(b)). For a period of about five years, "transactions ordinarily incident to" travel to and from as well as within Cuba were, with some limitations, exempted from the broad prohibition of Regulation 201(b) by a general license. See 31 CFR § 515.560 (1983). But this general license was amended in 1982, and the scope of permissible economic transactions in connection with travel to Cuba was significantly narrowed. 47 Fed. Reg. 17030 (1982).

Respondents challenged the amendment to the general license on constitutional and statutory grounds and sought a preliminary injunction against its enforcement. The District Court for the District of Massachusetts concluded that respondents had not demonstrated a substantial likelihood of

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**Michael E. Deutsch* filed a brief for the Chicago Council of Lawyers as *amicus curiae* urging affirmance.

*Herbert Semmel* filed a brief for the United National Council of Churches of Christ in the United States et al. as *amici curiae*.

success on the merits and refused to issue the injunction. App. to Pet. for Cert. 22a. On appeal taken by respondents, the Court of Appeals for the First Circuit, concluding that the challenged amendment lacked statutory authority, vacated the District Court's order and remanded with instructions to issue the preliminary injunction. 708 F. 2d 794 (1983). We granted the Government's application for a stay of the mandate, 463 U. S. 1223 (1983), as well as the petition for certiorari, 464 U. S. 990 (1983), and now reverse the judgment of the Court of Appeals.

## I

Regulation 201(b) was promulgated in 1963 as part of the Cuban Assets Control Regulations, 31 CFR pt. 515 (1963), implemented under the Trading With the Enemy Act of 1917 (TWEA), 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.* See 28 Fed. Reg. 6974 (1963).[1] At that time, § 5(b) of TWEA gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war.[2] The Cuban Assets Control Regulations constitute such an embargo.[3] They were originally adopted to deal with the peacetime emergency created by Cuban attempts to destabilize governments throughout Latin America. See Presidential Proclamation No. 3447, 3 CFR 157 (1959–1963 Comp.).[4]

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[1] Alternative statutory authority for the Cuban Assets Control Regulations was found in the Foreign Assistance Act of 1961, Pub. L. 87–195, 75 Stat. 424. See 28 Fed. Reg. 6974 (1963). Section 620(a) of that Act, which is still in force, provides:

"No assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba." 22 U. S. C. § 2370(a).

The Government has chosen not to rely on § 620(a) of the Foreign Assistance Act as statutory authority for the 1982 limitations on permissible travel-related economic transactions, apparently for two reasons. See Brief for Petitioners 4, n. 8. First, the scope of § 5(b) of TWEA, see n. 2, *infra*, appears to be broader than that of § 620(a) insofar as it reaches financial transactions unrelated to trade. Second, the Foreign Assistance Act does not provide criminal penalties for violations of the regulations promulgated under it. TWEA does so provide. See 50 U. S. C. App. § 16.

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[2] In 1963, § 5(b) of TWEA provided in relevant part:

"(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . ." 50 U. S. C. App. § 5(b) (1958 ed.).

TWEA was first passed in 1917, six months after the United States entered World War I. See Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. As originally enacted, TWEA dealt only with the President's use of economic powers in times of war. The Act was expanded to deal with peacetime national emergencies in 1933. Act of Mar. 9, 1933, ch. 1, 48 Stat. 1. The President has delegated his authority under TWEA to the Secretary of the Treasury, Exec. Order No. 9193, 3 CFR 1174, 1175 (1942), who in turn has delegated that authority to the Office of Foreign Assets Control, Treasury Department Order No. 128 (Rev. 1, Oct. 15, 1962).

[3] Similar embargoes are in place against North Korea, Vietnam, and Cambodia. See 31 CFR pt. 500 (1983).

[4] The Cuban Assets Control Regulations incorporated and expanded upon prior economic sanctions imposed on Cuba. See, *e. g.*, 27 Fed. Reg. 1116 (1962) (complete embargo on imports from Cuba); 43 Dept. State Bull. 715 (1960) (denial of export licenses for most industrial exports to Cuba). For a more complete statement of the policies behind these restrictions and the circumstances that precipitated their imposition, see Report of the Special Committee to Study Resolutions II.1 and VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. G/IV,

"[E]xcept as specifically authorized by the Secretary of the Treasury," Regulation 201(b) prohibits all "transactions involv[ing] property in which [Cuba], or any national thereof, has . . . any interest of any nature whatsoever, direct or indirect . . . ." 31 CFR § 515.201(b) (1983).

In 1977, Regulation 560 was added to the Cuban Assets Control Regulations. See 31 CFR § 515.560 (1977).[5] Regulation 560 embodied a general license permitting "persons who visit Cuba to pay for their transportation and maintenance expenditures (meals, hotel bills, taxis, etc.) while in Cuba." 42 Fed. Reg. 16621 (1977). Thus, travel-related economic transactions with Cuba were, for the most part, exempted from the complete embargo of Regulation 201(b).[6] All persons engaging in travel-related transactions, however, were required to make "a full and accurate record of each such transaction" and to keep those records available for inspection for at least two years. § 515.601. And the general license contained in Regulation 560 was subject to revocation or modification "at any time." § 515.805.

Later in 1977, § 5(b) of TWEA was amended to limit the President's power to act pursuant to that statute solely to times of war.[7] In the same bill, a new law was enacted to

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pp. 14–16 (1963); Cuba, Dept. of State Pub. No. 7171, pp. 25–36 (1961). See also *Zemel* v. *Rusk*, 381 U. S. 1, 14–15 (1965).

[5] Regulation 560 was first passed on March 29, 1977. 42 Fed. Reg. 16621. It was amended on May 18, 1977, to further relax existing restrictions on travel-related transactions with Cuba. 42 Fed. Reg. 25499.

[6] Some restrictions remained. For example, travelers were not allowed to purchase merchandise in Cuba with a foreign market value in excess of $100. Moreover, such merchandise could be purchased for personal use only and could not be resold. 31 CFR § 515.560(a)(3) (1977). Also, scheduled air and sea travel to Cuba was still prohibited, § 515.560(a)(5), as were any contracts between domestic credit card issuers and any Cuban enterprises "for the extension of credit to any traveler for any purpose," § 515.560(a)(7).

[7] Title I, § 101, of Pub. L. 95–223, 91 Stat. 1625, amended § 5(b) of TWEA "by striking out 'or during any other period of national emergency

cover the President's exercise of emergency economic powers in response to peacetime crises. International Emergency Economic Powers Act (IEEPA), Title II, Pub. L. 95–223, 91 Stat. 1626 *et seq.*, codified at 50 U. S. C. § 1701 *et seq.* The authorities granted to the President by § 203 of IEEPA are essentially the same as those in § 5(b) of TWEA,[8] but the conditions and procedures for their exercise are different.

Section 202(a) of IEEPA provides that the authorities granted the President by § 203 "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U. S. C. § 1701(a). The President is also required, "in every possible instance," to consult with Congress prior to exercising his IEEPA authorities and, once such authorities have been exercised, to report to Congress every six months on the actions taken and any changes in the underlying circumstances. § 1703.[9]

However, rather than requiring the President to declare a new national emergency in order to continue existing economic embargoes, such as that against Cuba, Congress decided to grandfather existing exercises of the President's "national emergency" authorities. Section 101(b) of Public Law 95–223 provides:

> "Notwithstanding the amendment made by subsection (a), the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which

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declared by the President' in the text preceding subparagraph (A)." For the text of § 5(b) prior to this amendment, see n. 2, *supra*.

[8] See *Dames & Moore* v. *Regan*, 453 U. S. 654, 671 (1981). There are some differences, however. The grant of authorities in IEEPA does not include the power to vest (*i. e.*, to take title to) foreign assets, to regulate purely domestic transactions, to regulate gold or bullion, or to seize records. See H. R. Rep. No. 95–459, pp. 14–15 (1977).

[9] Congress has reserved to itself the authority to terminate any declared national emergency by concurrent resolution. 50 U. S. C. § 1622.

> were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country . . . ." 91 Stat. 1625, note following 50 U. S. C. App. § 5.

This grandfather provision also provided that "[t]he President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States." *Ibid.* Presidents Carter and Reagan, in each of the years since TWEA was amended, have determined that the continued exercise of § 5(b) authorities with respect to Cuba is in the national interest.[10]

In 1982, in order to "reduce Cuba's hard currency earnings from travel by U. S. persons to and within Cuba," Regulation 560 was amended to curtail the general license permitting travel-related economic transactions. 47 Fed. Reg. 17030 (1982).[11] As amended, Regulation 560 only licenses travel-related economic transactions in connection with certain types of travel, such as official visits, news gathering, professional research, and visits to close relatives. 31 CFR § 515.560(a)(1) (1983). "[F]ully sponsored or hosted travel," which does not involve any economic benefit to Cuba, is also permitted. § 515.560(j). General tourist and business travel, however, is specifically excluded from the authorization contained in the general license. § 515.560(a)(3).[12]

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[10] See 48 Fed. Reg. 40695 (1983); 47 Fed. Reg. 39797 (1982); 46 Fed. Reg. 45321 (1981); 45 Fed. Reg. 59549 (1980); 44 Fed. Reg. 53153 (1979); 43 Fed. Reg. 40449 (1978).

[11] Regulation 560 was amended again in July of that year to further clarify the scope of permissible travel-related transactions with Cuba. 47 Fed. Reg. 32060 (1982). For a statement of the policies behind the amendments, see Declaration of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, ¶¶ 5–14, App. 172–177; Declaration of James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs ¶¶ 3–7, App. 178–181; Declaration of Myles R. R. Frechette, Director, Office of Cuban Affairs, Department of State ¶¶ 4–10, App. 107–108. See also *infra*, at 243.

As noted, respondents challenged the amendment to Regulation 560 on a number of statutory and constitutional grounds. Most important of these contentions, and the only one passed on by the court below, is the claim that the amendment is invalid because it was not promulgated in accordance with the procedures mandated by IEEPA.[13] The Government agrees that it did not follow the procedures set out in IEEPA when it amended Regulation 560, but relies for statutory authority for the amendment on the grandfather clause of Public Law 95–223, which preserved those "authorities . . . being exercised" pursuant to § 5(b) of TWEA on July 1, 1977. The Government argues that the "authority" to regulate travel-related transactions with Cuba was being exercised on July 1, 1977, as part of the general regulation of property transactions contained in Regulation 201(b). Thus, even though most such transactions were not actually prohibited on July 1 because of the general license, the Government contends that the President's authority to prohibit them was preserved.

The Court of Appeals gave three reasons for rejecting the Government's argument based, in turn, on the plain language, the legislative history, and the underlying purpose of the 1977 amendment to TWEA.[14] First, "as a matter of common sense and common English," the court stated, restricting commodity purchases and restricting travel purchases would seem to be very different "exercises" of authority—"different enough at least not to count as the exercise of the same authority." 708 F. 2d, at 796. Thus, since "the government was *not* restricting *travel* to Cuba" on July 1, 1977, its authority to do so was not grandfathered. *Ibid.* Second, the court thought that the legislative history showed that Congress intended the grandfather clause to be narrowly interpreted to allow the President to continue in effect only those specific "restrictions" actually in place on July 1, 1977. "It did not want the existence of one sort of TWEA restriction in 1977 to serve as a justification for imposing a new one." *Id.*, at 798.

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[12] As amended, Regulation 560 provides that special licenses may be issued in appropriate cases for travel-related transactions by "persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities." 31 CFR § 515.560(b) (1983).

[13] Respondents also claimed that the 1982 travel restrictions violated the 1978 Passport Act, 22 U. S. C. § 211a, which prohibits area restrictions on passports except in certain circumstances; that they exceeded the authority conferred by TWEA and by IEEPA; and that they violated respondents' First and Fifth Amendment rights, including the right to travel, due process, and equal protection. See Complaint ¶ 14, App. 9.

[14] The Court of Appeals for the Eleventh Circuit accepted the second and third of these reasons in striking down another regulation passed under the

Finally, the Court of Appeals concluded that the purpose behind the grandfather clause was solely to preserve current restrictions as bargaining chips in negotiations with the affected countries. To require the President to announce publicly a new declaration of emergency in order to preserve existing restrictions on transactions with those countries might have undesirable ramifications. On the other hand, simply to abandon the restrictions without any *quid pro quo* could be equally undesirable. Thus, the grandfather clause allowed current restrictions to remain in place. But, the court concluded, it would go beyond the purposes of the clause to permit the President to augment his bargaining powers by adding new restrictions. *Id.*, at 799–800.[15]

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grandfather clause to the 1977 amendmends to TWEA. *United States* v. *Frade*, 709 F. 2d 1387, 1397–1402 (1983).

[15] The Court of Appeals bolstered its conclusion with two additional considerations. First, the court noted that our cases required it to "construe narrowly all delegated powers that curtail or dilute" the right to travel, *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958), and that "[t]hat principle of narrow interpretation applies here." 708 F. 2d, at 800. Second, the court noted that in 1978 Congress amended the Passport Act, 22 U. S. C. § 211a, to prohibit the Executive Branch from imposing peacetime passport travel restrictions without the authorization of Congress, except for health and safety considerations. Pub. L. 95–426, § 124, 92 Stat. 971. "To interpret

## II

We find the reasoning of the Court of Appeals ultimately unconvincing on all three counts. The language of the grandfather clause, read in conjunction with § 5(b) of TWEA, supports the Government's contention that, in the relevant sense, the "authority" to regulate all property transactions with Cuba, including travel-related transactions, was being "exercised" on July 1, 1977 and was, therefore, preserved. And neither the legislative history nor the apparent purpose of the 1977 Act sufficiently supports the contrary contention that what Congress actually intended, despite the statutory language, was to freeze existing restrictions, so that any adjustment of pending embargoes would require the declaration of a new "national emergency" under the procedures of IEEPA.

The grandfather clause in Public Law 95–223 refers to the "authorities conferred upon the President by section 5(b) of the Trading with the Enemy Act." Among those authorities is the authority to "regulate . . . any . . . transactions involving . . . any property in which any foreign country or any national thereof has had any interest." 50 U. S. C. App. § 5(b). Section 5(b) draws no distinction between the President's authority over travel-related transactions and his authority over other property transactions. For purposes of TWEA, it is clear that the authority to regulate travel-related transactions is merely part of the President's general authority to regulate property transactions.[16] Thus, there is

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the 'savings clause' as the government suggests, would make the Passport Act amendment meaningless in terms of Cuba, for the Executive Branch could unilaterally impose Cuban travel restrictions by imposing currency restrictions as it did here." 708 F. 2d, at 801.

[16] Respondents argue that § 5(b) of TWEA never encompassed the power to regulate travel-related transactions. Brief for Respondents 21–31. In light of the sweeping statutory language, however, this argument borders on the frivolous. The President is authorized to regulate "any" transaction involving "any" property in which a foreign country or national thereof has "any" interest. Payments for meals, lodging, and transportation in

no basis for the Court of Appeals' conclusion, drawn without reference to the actual language of TWEA, that the regulation of travel-related purchases must be based on a separate authority from that governing the regulation of other transactions involving property. In fact, they are based on the same authority.[17]

It is also clear that the President's authority to regulate property transactions with Cuba and Cubans was being exercised on July 1, 1977. Regulation 201(b), which was in force on July 1, 1977, and continues in full force and effect today, explicitly prohibits, except as specifically authorized by the Secretary of the Treasury, all transactions involving prop-

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Cuba are all transactions with respect to property in which Cuba or Cubans have an interest. Such transactions, therefore, fall naturally within the statutory language, and there is no indication that Congress intended to limit the President's power to control them in response to a national emergency. See *Dames & Moore* v. *Regan*, 453 U. S., at 672 ("both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power"); *Guessefeldt* v. *McGrath*, 342 U. S. 308, 319 (1952).

In the alternative, see Brief for Respondents 10–20, respondents argue that a 1978 amendment to the Passport Act, 22 U. S. C. § 211a, eliminated whatever authority the President once had to regulate travel-related transactions under TWEA. See Pub. L. 95–426, § 124, 92 Stat. 971. But the 1978 amendment to the Passport Act is directed solely to the authority of the Secretary of State to impose area restrictions on the use of United States passports. The amendment has nothing to do with, and makes no mention of, the President's authority to regulate transactions under TWEA. Since repeals by implication are not favored, *TVA* v. *Hill*, 437 U. S. 153, 189–190 (1978); *Morton* v. *Mancari*, 417 U. S. 535, 549 (1974), respondents' argument must be rejected. The Court of Appeals' reliance on the Passport Act in its construction of the grandfather clause, see n. 15, *supra*, is similarly unpersuasive.

[17] Further proof that Congress did not distinguish between travel-related transactions involving foreign property and other property transactions, either when TWEA was first passed or when it was amended in 1977, is provided by § 203(a) of IEEPA. Section 203(a), which delineates the authorities of the President following a declaration of national emergency under the new procedures of IEEPA, merely tracks the language of § 5(b) of TWEA. See n. 8, *supra*.

erty in which Cuba or Cuban nationals have "any interest of any nature whatsoever, direct or indirect." 31 CFR § 515.201(b) (1983). Thus, absent an explicit license, *all* transactions involving Cuban property are and, at all relevant times, have been prohibited.

On July 1, 1977, most travel-related transactions with Cuba and Cuban nationals were permitted by a general license. But that does not change the fact that the President was exercising his § 5(b) authorities with respect to those transactions. Section 5(b) specifically states that the authorities granted therein may be exercised "by means of instructions, licenses, or otherwise." On July 1, 1977, the President was exercising his authority over travel-related transactions with Cuba and Cubans by means of a general license which exempted them from the categorical prohibition of Regulation 201(b).

At that time, travel-related transactions involving Cuban property were still subject to the recordkeeping requirements of 31 CFR § 515.601 (1977). Other restrictions were also imposed. See n. 6, *supra*. And the general license was expressly subject to revocation, amendment, or modification "at any time." § 515.805. Thus, travel-related transactions "were specifically made subordinate to further actions which the President might take . . . ." *Dames & Moore* v. *Regan*, 453 U. S. 654, 673 (1981). And when the general license was amended in 1982, so that most travel-related transactions were no longer specifically authorized, such transactions automatically became subject, once again, to the prohibition of Regulation 201(b).[18]

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[18] We think that the Court of Appeals for the First Circuit may have been confused as to some aspects of the Cuban embargo. The court states that respondents are prevented from traveling to Cuba by "a Treasury Department regulation that prohibits them . . . from paying for 'transportation-related' expenses 'ordinarily incident to travel to and from Cuba' and for any other expenses 'ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for per-

Since the authority to regulate travel-related transactions was among those "authorities conferred upon the President" by § 5(b) of TWEA "which were being exercised" with respect to Cuba on July 1, 1977, it seems to us to follow from a natural reading of the grandfather clause that the authority to regulate such transactions "may continue to be exercised" with respect to Cuba after that date. Pub. L. 95–223, § 101(b), 91 Stat. 1625. And since the President's authority under § 5(b) to regulate by means of licenses includes the authority to "prevent or prohibit" as well as the authority to "direct and compel," 50 U. S. C. App. § 5(b)(1)(B), it also follows that the grandfather clause constitutes adequate statutory authority for the 1982 amendment to the general license, the practical effect of which was to prevent travel to Cuba.

A contrary, more constricted reading of the grandfather clause does undue violence to the words chosen by Congress. The clause refers to "authorities" being exercised on July 1, 1977, not to "prohibitions" actually in place on that date. And it provides that those authorities "may continue to be

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sonal consumption there.' 31 CFR § 515.560 (1982)." 708 F. 2d, at 795. But, of course, 31 CFR § 515.560 (1983) does not prevent respondents from doing anything. As amended, it merely fails to include them in the license that it grants to some persons. Regulation 201(b)'s general prohibition on transactions involving property in which Cuba or Cubans have an interest is what, as a practical matter, prevents respondents from traveling to Cuba.

On the next page of its opinion, the court states that "[a]lthough the Treasury Department regulated travel to Cuba by means of regulations of the sort here at issue from 1963 to early 1977, on March 29, 1977, the Department repealed those travel restrictions . . . ." *Id.*, at 796. Again, there were no separate "travel restrictions," either to be repealed in 1977 or reimposed in 1982. The source of all restrictions on property transactions is Regulation 201(b), which has been in effect continuously since 1963. Properly understood, the structure of the Cuban embargo undercuts the argument that restrictions on travel purchases and restrictions on commodities purchases are "very different" exercises of authority.

exercised." If Congress had wished to freeze existing restrictions, it could easily have done so explicitly. The fact that it did not do so, but instead used the generic term "authorities," indicates that Congress intended the President to retain some flexibility to adjust existing embargoes.

The Court of Appeals felt that its more constricted reading of the grandfather clause comported with the legislative history surrounding the enactment of Public Law 95-223. We would certainly agree that the following colloquy between Representative Cavanaugh and Assistant Secretary of the Treasury Bergsten, the administration's spokesman for the bill, supports a narrow reading of the grandfather clause:

> "MR. CAVANAUGH. . . . First of all, Mr. Bergsten, would it be your understanding that [the grandfather clause] would strictly limit and restrict the grandfathering of powers currently being exercised under 5(b) [of TWEA] to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> "MR. BERGSTEN. Yes, sir.
>
> "MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.
>
> "MR. BERGSTEN. That is right." [19]

We also agree that a narrow construction at least appears to be supported by Representative Bingham's objections to, and the subsequent elimination of, language in a Subcommittee staff draft which would have expressly grandfathered presently unused authorities of the President under § 5(b) of TWEA so long as they were used to deal with a "set of circumstances" already being dealt with under some other authority.[20]

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[19] Revision of Trading with the Enemy Act: Markup before the House Committee on International Relations, 95th Cong., 1st Sess., 21 (1977) (hereinafter cited as Markup).

But even if these were the only available indications of congressional intent apart from the language which Congress enacted, we would have grave doubts that they were sufficient to overcome what seems to us to be the clear, generic meaning of the word "authorities." Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President.

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[20] Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess., 167 (1977) (hereinafter cited as Emergency Controls Hearings). Understood in context, however, the fact that such language was deleted from the Subcommittee draft is at best ambiguous. In response to a request by Representative Bingham for the administration's reaction to the draft language, Mr. Santos from the Department of the Treasury testified on June 9, 1977, over two months after Regulation 560 was promulgated, that the language was unnecessary because the President was in fact exercising all of the authorities provided by § 5(b) of TWEA: "We have reviewed the powers conferred under this draft. Frankly we believe that all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised." *Id.*, at 188. Representative Bingham then stated: "You have said, as I understand it, that there is no need for subparagraph 2 [grandfathering presently unused powers], that you would not be disturbed by the elimination of paragraph 2." *Ibid.* Thus, the challenged language may simply have been deleted as surplusage. If so, the deletion supports the view that the phrase "authorities being exercised" embraces much more than simply those restrictions actually in place on July 1, 1977.

In our opinion, a full examination of the legislative history—the Subcommittee hearings, markup sessions, floor debates, and House and Senate Reports—does not support the view that only those restrictions actually in place on July 1, 1977, were to be grandfathered.[21] The crucial point is that the discussion, even in the Cavanaugh and Bingham excerpts, is consistently carried on in terms of existing "powers" and "authorities," not in terms of existing "restrictions" or "prohibitions."[22] The legislative history simply does not

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[21] The Court of Appeals read that history in light of its erroneous conclusion that the regulation of travel purchases is wholly different from the regulation of other transactions involving Cuban property. See *supra*, at 232–233, and n. 18. The Court of Appeals also freely substituted the word "restrictions" for "authorities" in drawing its conclusions from the legislative history. See 708 F. 2d, at 798. Thus, the court fastened onto isolated statements to the effect that only existing "uses" of authority were to be grandfathered, and concluded that since travel restrictions were not currently being used, such restrictions could not now be imposed. *Ibid.*

We have already discussed the flaws in this argument. When the language of the grandfather clause is read in light of § 5 of TWEA and the structure of the Cuban Assets Control Regulations in effect on July 1, 1977, it becomes clear that the President's authority to regulate all property transactions with Cuba and Cuban nationals, including travel-related transactions, was being "used" on the relevant date. One might argue that the phrase "uses of authorities" is somehow narrower than the phrase "authorities . . . being exercised" and that the former refers only to specific restrictions. But even if such an argument does not parse concepts too finely, the fact remains that the latter phrase, not the former, was enacted into law.

[22] See, *e. g.*, H. R. Rep. No. 95–459, pp. 1, 7, 10, 12–13 (1977); S. Rep. No. 95–466, pp. 1, 4 (1977); Emergency Controls Hearings, at 207 (remarks of Rep. Bingham); *id.*, at 147–148 (remarks of Mr. Majak), *id.*, at 168 (remarks of Rep. Cavanaugh); Markup, at 7 (prepared statement of Rep. Bingham); *id.*, at 21 (remarks of Rep. Cavanaugh); 123 Cong. Rec. 22476 (1977) (remarks of Rep. Bingham).

There are even explicit statements in the legislative history that the regulation of travel-related transactions was among the "authorities being exercised with regard to Cuba . . . ." Emergency Controls Hearings, at 215 (remarks of Mr. Santos); *id.*, at 197 (remarks of Mr. Majak, Staff Director of Subcommittee on International Economic Policy and Trade) ("[T]he news media, in the case of Cuba objected to the fact that they are countenance the suggestion that Congress really meant "restrictions" even though it wrote "authorities."

Finally, we reject the Court of Appeals' view that the purpose of the grandfather clause was merely to preserve existing bargaining chips in negotiations with affected countries. There are some statements in the Subcommittee hearings to the effect that existing embargoes should not be abandoned without exacting some sort of negotiated *quid pro quo.*[23] But it is clear that the prime reason that existing embargoes were grandfathered was to keep the bill, H. R. 7738—which included IEEPA as well as the amendments to TWEA—from becoming too controversial. Members of the Subcommittee feared that if current embargoes were implicated the bill would bog down in partisan disputes, thereby delaying implementation of the new procedures of IEEPA.[24]

The House Report is explicit on this point.

> "Certain current uses of the authorities affected by H. R. 7738 are controversial—particularly the total U. S. trade embargoes of Cuba and Vietnam. The committee considered carefully whether to revise, or encourage the President to revise, such existing uses of international economic transaction controls, and thereby the policies they reflect, in this legislation. The committee decided that to revise current uses, and to improve policies and procedures that will govern future uses, in a single bill would be difficult and divisive. Committee members concluded that improved procedures for future use of emergency international economic powers should take precedence over changing existing uses. By

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subjected to a licensing process in order to travel to certain embargoed countries. That was certainly a part of the exercise of the authorities").

[23] See *id.*, at 103 (statement of Mr. Bergsten); *id.* at 12 (statement of Prof. Andreas F. Lowenfeld).

[24] See Markup, at 7–8 (prepared statement of Rep. Bingham); Emergency Controls Hearings, at 207 (summary of staff draft); *id.* at 198 (remarks of Rep. Whalen); *id.*, at 190–191 (remarks of Mr. Santos); *id.*, at 168 (remarks of Rep. Bingham).

> 'grandfathering' existing uses of these powers, without either endorsing or disclaiming them, H. R. 7738 adheres to the committee's decision to try to assure improved future uses rather than remedy possible past abuses." H. R. Rep. No. 95–459, pp. 9–10 (1977).

Hewing to this noncontroversial approach, Representative Bingham, the Chairman of the responsible House Subcommittee, assured the Members of the House that "this legislation specifically grandfathers the embargoes against Vietnam, Cambodia, Laos, Cuba, and other existing embargoes, so that *they are not affected in any way by this legislation.*" 123 Cong. Rec. 38166 (1977) (emphasis added). Our reading of the grandfather clause is consistent with these clear statements of its purpose and effect. Eliminating the President's authority to modify existing licenses in response to heightened tensions with Cuba would have sparked just the sort of controversy the grandfather clause was designed to avoid. See Emergency Controls Hearings, at 207 (summary of staff draft); *id.*, at 210 (remarks of Rep. Bingham).

## III

Respondents finally urge that if we do find that the President is authorized by Congress to enforce the regulations here in question, their enforcement violates respondents' right to travel guaranteed by the Due Process Clause of the Fifth Amendment. Respondents rely on a number of our prior decisions which recognized such a right, beginning in 1958 with *Kent* v. *Dulles*, 357 U. S. 116. Respondents' counsel undoubtedly speaks with some authority as to these cases, since he represented the would-be travelers in most of them.

In *Kent*, the Court held that Congress had not authorized the Secretary of State to inquire of passport applicants as to affiliation with the Communist Party. The Court noted that the right to travel "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law," *id.*, at 125, and stated that it would "construe narrowly all delegated powers that curtail or dilute" that right. *Id.*, at 129.[25] Subsequently, in *Aptheker* v. *Secretary of State*, 378 U. S. 500, 514 (1964), the Court held that a provision of the Subversive Activities Control Act of 1950, 64 Stat. 993, forbidding the issuance of a passport to a member of the Communist Party, "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."

Both *Kent* and *Aptheker*, however, were qualified the following Term in *Zemel* v. *Rusk*, 381 U. S. 1 (1965). In that case, the Court sustained against constitutional attack a refusal by the Secretary of State to validate the passports of United States citizens for travel to Cuba. The Secretary of State in *Zemel*, as here, made no effort selectively to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba following the break in diplomatic and consular relations with that country in 1961. The Court in *Zemel* distinguished *Kent* on grounds equally applicable to *Aptheker*.

> "It must be remembered . . . that the issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations. . . . In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens." 381 U. S., at 13.

The Court went on to note that, although the ban in question effectively prevented travel to Cuba, and thus diminished the right to gather information about foreign countries, no First Amendment rights of the sort that controlled in *Kent* and *Aptheker* were implicated by the across-the-board restriction in *Zemel*. And the Court found the Fifth Amendment right to travel, standing alone, insufficient to overcome the foreign policy justifications supporting the restriction.

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[25] In *Kent*, 357 U. S., at 126–127, the constitutional right to travel within the United States and the right to travel abroad were treated indiscriminately. That position has been rejected in subsequent cases. See *Haig* v. *Agee*, 453 U. S. 280, 306 (1981) ("the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States"); *Califano* v. *Aznavorian*, 439 U. S. 170, 176–177 (1978).

> "That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months." 381 U. S., at 16.

We see no reason to differentiate between the travel restrictions imposed by the President in the present case and the passport restrictions imposed by the Secretary of State in *Zemel*. Both have the practical effect of preventing travel to Cuba by most American citizens, and both are justified by weighty concerns of foreign policy.[26]

Respondents apparently feel that only a Cuban missile crisis in the offing will make area restrictions on international travel constitutional. They argue that there is no "emergency" at the present time and that the relations between Cuba and the United States are subject to "only the 'normal' tensions inherent in contemporary international affairs." Brief for Respondents 55. The holding in *Zemel*, however, was not tied to the Court's independent foreign policy analysis. Matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 589 (1952). Our holding in *Zemel* was merely an example of this classical deference to the political branches in matters of foreign policy.

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[26] *United States* v. *Laub*, 385 U. S. 475 (1967), upon which respondents also rely, involved only a statutory question of whether an indictment properly charged a crime under the laws of the United States. In our view, the case sheds no light on the issues presented here.

The Cuban Assets Control Regulations were first promulgated during the administration of President Kennedy. They have been retained, though alternately loosened and tightened in response to specific circumstances, ever since. In every year since the enactment of IEEPA in 1977, first President Carter and then President Reagan have determined that the continued exercise of the authorities of § 5(b) of TWEA against Cuba is in the national interest. See n. 10, *supra.* Since both were acting under the grandfather clause of Public Law 95–223, there was no legal requirement that either of them proclaim a new national emergency under the procedures of IEEPA. But the absence of such a proclamation does not detract from the evidence presented to both the District Court and the Court of Appeals to the effect that relations between Cuba and the United States have not been "normal" for the last quarter of a century, and that those relations have deteriorated further in recent years due to increased Cuban efforts to destabilize governments throughout the Western Hemisphere. See Enders Declaration ¶ 5, App. 172.

In the opinion of the State Department, Cuba, with the political, economic, and military backing of the Soviet Union, has provided widespread support for armed violence and terrorism in the Western Hemisphere. Cuba also maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. See Frechette Declaration ¶ 4, App. 107. Given the traditional deference to executive judgment "[i]n this vast external realm," *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936), we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel. *Zemel* v. *Rusk*, *supra*, at 14–15; *Haig* v. *Agee*, 453 U. S. 280, 306–307 (1981).

## IV

In sum, we conclude, based on an analysis of the language of the grandfather clause as well as its purpose and legislative history, that the grandfathered authorities of § 5(b) of TWEA provide an adequate statutory basis for the 1982 amendment restricting the scope of permissible travel-related transactions with Cuba and Cuban nationals. We also conclude that such restrictions do not violate the freedom to travel protected by the Due Process Clause of the Fifth Amendment.

The judgment of the Court of Appeals is

*Reversed.*

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE POWELL join, dissenting.

All parties concede that the 1982 restrictions on travel-related expenditures in Cuba, 47 Fed. Reg. 17030 (1982), were not promulgated in conformity with the procedural requirements of the International Emergency Economic Powers Act of 1977, Pub. L. 95–223, Title II, 91 Stat. 1626, 50 U. S. C. §§ 1701–1706 (IEEPA). Thus, those restrictions are invalid unless they were authorized by § 101(b) of Pub. L. 95–223, 91 Stat. 1625, the grandfather clause of the IEEPA. Because I do not agree that the grandfather clause encompasses the exercise of Presidential power at issue here, I would affirm the judgment of the United States Court of Appeals for the First Circuit.

## I

Congress promulgated Public Law 95–223 to address problems unforeseen by the drafters of the Trading With the Enemy Act of 1917, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.* (TWEA). The TWEA was one of several statutes that reflected Congress' conclusion that the President should have increased authority in times of war or national emergency in order to respond to such crisis situations with the coordinated alacrity they require. Accordingly, the TWEA provided the President with a broad range of powers over international trade in time of war or "national emergency."

Although TWEA provided clear procedures for enhancing the authority of a President when an emergency arose, the Act contained no similar provision to reduce the President's authority to its normal scope when the emergency subsided. Once the President had declared a state of national emergency, the emergency officially continued to exist until the President declared that it had ended. Until such a declaration of termination was made, the President enjoyed the broad authority that the TWEA conferred upon him to address the original emergency. The historical record shows that once a President had declared the existence of a national emergency, he was slow to terminate it even after the circumstances or tensions that had led to the declaration could no longer be said to pose a threat of emergency proportion to the Nation. See generally Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess., 16–19 (1977) (Subcommittee Hearings) (statement of Prof. Andreas F. Lowenfeld); *id.*, at 27–31 (statement of Prof. Harold G. Maier).

Because of this pattern of behavior, TWEA emergency authority operated as a one-way ratchet to enhance greatly the President's discretionary authority over foreign policy. At the time that Congress began to consider amendments to the TWEA, the United States technically faced four declared states of "emergency." Among the four were President Franklin D. Roosevelt's 1933 Bank Holiday Declaration, Presidential Proclamation No. 2040, 48 Stat. 1691; President Nixon's 1970 declaration concerning a Post Office strike, Presidential Proclamation No. 3972, 3 CFR 473 (1966–1970 Comp.); and President Nixon's 1971 declaration concerning the country's balance-of-payments problems, Presidential Proclamation No. 4074, 3 CFR 60 (1971–1975 Comp.). The national emergency most often invoked in connection with exercises of TWEA powers was the emergency that had been declared on December 16, 1950, by President Truman in response to the developing Korean conflict. Presidential Proclamation No. 2914, 64 Stat. A454. That Proclamation warned of the threat of Communist aggression. Because of this declaration of emergency, the President retained broad authority of indefinite duration to respond to anything that logically could be related to the general threat of the spread of Communism.

There was widespread feeling that this broad grant of emergency powers conflicted with the intent of the TWEA, which sought to empower a President to respond to situations that presented an imminent threat requiring immediate response.[1] The expert witnesses who testified before the House Subcommittee expressed a general consensus that § 5(b) of the TWEA inappropriately had been used as a flexible instrument of foreign policy in nonemergency situations. See, *e. g.*, Subcommittee Hearings, at 13–14, 16 (statement of Prof. Andreas F. Lowenfeld) ("no practical constraint limiting actions taken under emergency authority to measures related to the emergency"); *id.*, at 22–23 (statement of Prof. Harold G. Maier) ("combination of legislative permissiveness and executive assertiveness over the past 40 years has created a significant shift in the functional allocations of constitutional power to regulate foreign commerce"); *id.*, at 39 (statement of Prof. Stanley D. Metzger) (suggesting necessary checks and limitations on executive use of § 5(b) powers); *id.*, at 83 (statement of Peter Weiss, Center for Constitutional Rights) (TWEA "a prime example of the unchecked proliferation of Presidential power for purposes totally unforeseen by the creators of that power").

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[1] Congressional scrutiny of the TWEA powers was part of a larger effort to review the bases of all the President's emergency powers. In 1976, Congress enacted the National Emergencies Act, Pub. L. 94–412, 90 Stat. 1255, 50 U. S. C. § 1601 *et seq.*, which, by its § 101(a), provided that powers exercised pursuant to existing states of national emergency would be terminated within two years after its date of enactment. The National Emergencies Act, however, exempted § 5(b) of the TWEA and several other provisions from that 2-year termination requirement in order to afford Congress the opportunity for more thorough consideration of the powers and procedures conferred upon the President by those provisions. §§ 502(a)(1) and (b), 90 Stat. 1258, 1259; Subcommittee Hearings, at 1–2.

The Members of Congress who heard the testimony found it convincing. See, *e. g.*, H. R. Rep. No. 95–459, p. 7 (1977) (§ 5(b) "has become essentially an unlimited grant of authority"); Revision of Trading with the Enemy Act, Markup before the House Committee on International Relations, 95th Cong., 1st Sess., 8 (1977) (House Markup) (statement of Rep. Bingham) ("Section 5(b) has become a grab-bag of authorities which Presidents have been able to use to do virtually anything for which they could find no specific authority"). House Subcommittee Members also believed that some of the actions taken by the Executive Branch under the TWEA had, at most, a shaky foundation in actual emergency situations. In an exchange with Assistant Secretary of State Julius L. Katz, Subcommittee Chairman Bingham voiced his incredulity concerning the bases for certain then-effective regulations promulgated under § 5(b):

> "MR. BINGHAM. Mr. Katz, what is the national emergency currently facing us that warrants the use of powers under the [TWEA]? . . .
>
> "MR. KATZ. It continues to be the emergency involving the threat of Communist aggression which was declared in 1950 at the time of the aggression in Korea.
>
> "MR. BINGHAM. Are you serious?
>
> "MR. KATZ. That is the national emergency, Mr. Chairman, and it continues.
>
> "MR. BINGHAM. The emergency is the emergency that existed in 1950?
>
> "MR. KATZ. It has not been terminated." Subcommittee Hearings, at 110.[2]

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[2] See also *id.*, at 117, 119 (remarks of Rep. Bingham) (referring specifically to lack of emergency with Cuba).

Dissatisfied generally with the responses of spokesmen from the Executive Branch, Representative Bingham criticized the administration's lack of cooperation in the effort to amend the TWEA. He further observed:

> "Now I think that you have to face the facts, which are that the executive branch wants to be free to continue to act with an enormous degree of discretion on the basis that an emergency exists, although by no commonsense application of the term could the situation be called an emergency.
>
> "The threat of Communist aggression, if you will, or the threat of Communist competition which we face in the world, Mr. Katz, is a permanent situation. It is not an emergency unless you are going to define the situation that exists in the world today as a permanent emergency. I don't see how you justify use of the term.
>
> . . . . .
>
> "Up until now the reaction of the subcommittee, and the reaction of the witnesses that we have had, has been that the situation that we are in is quite an incredible one, and it has to be substantially altered to try to conform with reality and with principle." *Id.*, at 113–114.

It is clear that Congress intended to curtail the discretionary authority over foreign affairs that the President had accumulated because of past "emergencies" that no longer fit Congress' conception of that term. To accomplish this goal, Congress amended the TWEA and enacted the IEEPA. Congress left intact the powers that the TWEA had conferred upon the President during time of war, but removed from the TWEA the authority for Presidential action in a national emergency. As a substitute for those powers, Congress promulgated the IEEPA to confer power upon the President in national-emergency situations. The substantive reach of the President's power under the IEEPA is slightly narrower than it had been under the TWEA,[3] and Congress placed several procedural restrictions on the President's exercise of the national-emergency powers, including congressional consultation, review, and termination.

The prospective nature of the IEEPA left Congress with the dilemma of how to deal with existing regulations that had been promulgated under § 5(b) and obviously had not been issued in accordance with the new procedures set forth in the IEEPA. There were those on the House Subcommittee considering the amendments to the TWEA who thought that there should be no grandfathering and that the existing regulations should be allowed to expire. See, *e. g.*, Subcommittee Hearings, at 167, 168–169, 198 (remarks of Rep. Cavanaugh); *id.*, at 210 (remarks of Rep. Findley); *id.*, at 119 (colloquy between Rep. Bingham and Assistant Treasury Secretary Bergsten). Such an approach would have required the President to evaluate each situation in which regulations were in effect and to determine whether the need for reinstitution of the regulations justified a new declaration of national emergency. Others believed that Congress should conduct such a review and determine which restrictions were still justified by current exigencies. See H. R. Rep. No. 95–459, at 9–10. In response to two related concerns, however, the view that there was a need for some sort of grandfathering finally carried the day.

The first argument supporting a grandfather clause was the desire to preserve the administration's bargaining position in dealing with countries that were the subject of existing embargoes and asset freezes. Testimony before the

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[3] Four powers conferred upon the President by the TWEA were not included in the powers conferred upon the President for use in time of national emergency under the IEEPA. Those four powers are: (1) the power to take title to foreign property; (2) the power to regulate purely domestic transactions; (3) the power to regulate gold or bullion; and (4) the power to seize records.

House Subcommittee expressed the view that the President should not be forced by Congress to make unilateral concessions to countries that had been the targets of exercises of § 5(b) authorities. In other words, many believed that the President should not be forced to give up "bargaining chips" without receiving something in return from the countries on the other side of the negotiations. Subcommittee Hearings, at 19 (statement of Prof. Lowenfeld) ("perhaps [the Cuba embargo] should not be terminated . . . without a quid pro quo"); *id.*, at 103, 113, 119 (statements of Assistant Treasury Secretary Bergsten) (unilateral termination of embargoes "would severely undermine the U. S. negotiating position with those countries, and our worldwide posture"); 123 Cong. Rec. 22477 (1977) (remarks of Rep. Whalen).

The second argument in favor of some form of a grandfather clause was related to the first. Several of the witnesses who testified at the hearings on the bill felt that the President should not be faced with the need to declare a new national emergency in order to continue existing restrictions. Such a declaration would have foreign policy reverberations of its own, and might inject new tension into a sensitive situation in which tensions were on the decline. See, *e. g.*, Subcommittee Hearings, at 19 (statement of Prof. Lowenfeld); *id.*, at 191–192 (remarks of Mr. Santos, Treasury Department attorney adviser). It would have been incongruous, in other words, for Congress to force the President to declare new emergencies in nonemergency situations simply to avoid having to end restrictions that, for negotiating reasons, the President had concluded should not be ended unilaterally.

The proponents of grandfathering voiced their desire that the grandfather clause be tailored narrowly to fit these concerns. In its early form before the Subcommittee, the clause contained two subparts, §§ 101(b)(1) and (2), which read:

> "(1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national

> emergency declared by the President before such date of enactment, may continue to be exercised with respect to such set of circumstances; and
>
> "(2) *any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances.*" Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess., § 101(b) (emphasis added).

In response to a question about the meaning of § 101(b)(2), Subcommittee Staff Director R. Roger Majak explained the purposes of the provision:

> "[W]ith respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by section 5(b).
>
> "So if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to the situation.
>
> . . . . .
>
> "I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage." Subcommittee Hearings, at 167.

Representative Bingham voiced his opposition to such a broad grandfather clause.

> "I have a serious question about that. It seems to me that if the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It is really going beyond grandfathering.

> "It seems to me that grandfathering applies to what has been done to date, and that should be ample authority." *Ibid.*

Section 101(b)(2) was removed from the draft bill presented to the Committee.[4] I can think of few sorts of information routinely found in legislative histories that would give a clearer indication that Congress intended to grandfather only the regulations and restrictions that already had been exercised.[5]

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[4] I am not persuaded by the Court's attempt to minimize the significance of the deletion of § 101(b)(2). See *ante*, at 237, n. 20. First of all, when the colloquy between Mr. Santos (Treasury Department attorney adviser) and Representative Bingham is read in context, it is clear that the major area of concern for both Mr. Santos and Representative Bingham was the question of what conditions should be placed on the President's ability to continue to exercise those authorities that were currently being exercised under § 5(b), *i. e.*, whether the President should be required to declare a continuing national emergency or merely be required to declare that continued exercise is in the national interest. A careful reading of the entire testimony of Mr. Santos, see Subcommittee Hearings, at 187–197, suggests that, at various points, Representative Bingham and Mr. Santos were not understanding one another's questions and comments. There was never any "meeting of the minds" on the import of Mr. Santos' comment that all "the powers conferred [were being] exercised and that there [were] no additional powers that could be exercised that [were] not already [being] exercised." *Id.*, at 188.

Further, it is nonsensical to assume that Mr. Santos meant, or that Representative Bingham could have understood him to mean, that *all* § 5(b) powers were being exercised with respect to the countries that were currently the subject of regulations promulgated under § 5(b). For example, both participants in the conversation were well aware that in addition to the embargoes of North Korea, Vietnam, Cambodia, and Cuba, there were in effect Transaction Control Regulations, 31 CFR § 505.10 *et seq.* (1977), which prohibited any "person within the United States" from purchasing from any foreign country strategic commodities destined for a Communist country, and Foreign Funds Control Regulations, 31 CFR § 520.01 *et seq.* (1977), which blocked certain assets of East Germany, Czechoslovakia, Latvia, Lithuania, and Estonia that had been blocked during World War II. No party to this litigation and nothing in the legislative history suggest that there is any support for the view that all powers under § 5(b) were being exercised with respect to all these countries. Mr. Santos' statement is ambiguous and confusing, and I do not think it wise to allow this single, isolated exchange to cast a shadow of doubt over the clear import of the deletion of § 101(b)(2).

When the full House Committee viewed § 101(b) after § 101(b)(2) had been deleted, Representative Cavanaugh sought to ascertain that the clause was drawn as narrowly as possible to include only those regulations currently in effect:

> "MR. CAVANAUGH. . . . First of all, Mr. Bergsten, would it be your understanding that section 101 would strictly limit and restrict the grandfathering of powers currently being exercised under 5(b) to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> "MR. BERGSTEN. Yes, sir.
>
> "MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.
>
> "MR. BERGSTEN. That is right." House Markup, at 21.

In explaining the effect of the grandfather clause to the full House Committee, Representative Bingham stressed that the grandfather clause would leave intact "specific current uses of 5(b) authorities" and emphasized that the bill "neither condones nor condemns existing policies." *Id.*, at 7.

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[5] That the Subcommittee wanted the grandfather clause to be read narrowly is also evinced by suggestions that the Subcommittee find ways to convey its intention that the grandfather provision be tightly construed. Subcommittee Hearings, at 212 (remarks of Rep. Findley). In response, Representative Bingham suggested that the changes in the bill discussed during the hearings be incorporated and that the bill be reported to the full Committee before further amendments were made. Obviously sympathetic to any means of clearly delimiting the scope of the grandfather clause, Representative Bingham, who had suggested deleting § 101(b)(2), encouraged Representative Findley to present his suggestions to narrow the scope of the clause to the full Committee if Representative Findley felt that such narrowing were still necessary after the bill had been amended according to the Subcommittee's specifications. Subcommittee Hearings, at 212.

It is important to emphasize that the decision to grandfather the specific uses of authorities being exercised at a certain date did not reflect congressional acknowledgment that those uses of authorities were in fact addressed to true emergency situations. To the contrary, Congress openly expressed its view that many of the grandfathered restrictions had no real basis in an emergency situation. H. R. Rep. No. 95–459, at 11 (few current uses could be justified as responding to existing emergency situations). Responding to this sentiment, Congress expressly provided annual procedures governing the continuation of grandfathered authorities that are different from the procedures that govern the continued exercise of any new restrictions entered pursuant to a new state of emergency. With respect to future exercises of emergency power, the President's decision to continue in effect the proclamation of national emergency, and the regulations promulgated thereunder, are subject to semiannual review by Congress. See 50 U. S. C. §§ 1622(b), 1641(c). With respect to grandfathered authorities, the grandfather clause requires only that the President find continued exercise of the authority to be in the national interest. § 101(b), 50 U. S. C. App. § 5; Subcommittee Hearings, at 208. In this way, the Subcommittee avoided perpetuating the "phony character" of the national emergencies under which current exercises of § 5(b) power were promulgated. *Id.*, at 210. See also, *id.*, at 193 (statement by Mr. Santos, Treasury Department attorney adviser) (administration would have difficulty making good-faith declaration of current national emergency with respect to Cuba); House Markup, at 3 (remarks of Rep. Bingham).

In sum, the grandfather provision of the IEEPA was designed narrowly to respond to a particularized set of concerns. It sought to avoid placing the President in the awkward situation either of making unilateral concessions to countries subject to restrictions or declaring a new state of emergency with respect to a country where none, in fact, existed. Congress concluded that these objectives were served fully with a grandfather clause that preserved existing restrictions, but gave the President no authority to impose new restrictions except through the new IEEPA procedures that govern the President's authority to respond to new emergencies.

## II

The Court rejects this narrow interpretation in favor of one that loses all sight of the general legislative purpose of the IEEPA and the clear legislative intent behind the grandfather clause. To achieve its labored result, the Court invokes a series of platitudes on statutory interpretation, but ignores their application to this case. Ironically, the very pieces of legislative history that the Court cites to justify its result clearly support the contrary view.

Recognizing the clear import of the legislative history, the Court begins by discovering absolute clarity in the "plain language" of the statute. The Court focuses on the fact that Congress used the term "authorities" in the grandfather clause instead of either the word "restrictions" or "prohibitions." Finding what, in its view, is a vast difference between the meaning of the first term and that of the latter two, the Court concludes that if Congress had meant "restrictions" it would have said so explicitly. *Ante*, at 236.

But the Court's confident claim that the statutory language is without ambiguity is pure *ipse dixit*. The Court concedes that throughout the legislative history Congress referred to what it wanted to grandfather as "restrictions," "controls," "specific uses," "prohibitions," "existing uses," and "authorities." It is true that Congress used the word "authorities" when it drafted the statute, but there is nothing to indicate that it used the term "authorities" to express any intent other than that which is made plain in the legislative history. The likely reason that the term "authorities" was used instead of a term such as "prohibitions" is simply that § 5(b) authorized a President to do much more than issue prohibitions, and Congress intended to grandfather the uses of those powers as well. For example, § 5(b) authorizes the President to conduct investigations of various activities and to "freeze" the assets of foreign countries and foreign nationals. At the time Congress enacted the IEEPA, the President had exercised these authorities over several countries, including Cuba, and Congress clearly intended to grandfather those exercises. Because the exercise of these powers does not fit naturally within a word such as "prohibitions," it is hardly surprising that Congress did not use that term. Thus, the short answer to the Court's question as to why Congress did not use the term "prohibitions" is simply that Congress intended to include more than mere prohibitions.

There is nothing in the language of the statute to suggest, however, that Congress intended the grandfather clause to provide a President with the authority to increase the restrictions applicable to a particular country without following the IEEPA procedures. As the legislative history makes clear, when Congress grandfathered all "authorities . . . being exercised," it sought to preserve the uses of § 5(b) authorities that the President had employed in the past to address a particular situation—but no more. As Representative Bingham, a principal drafter of the bill, stated: "if the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done." Subcommittee Hearings, at 167.

In its effort to downplay the clear legislative history of the grandfather clause, the Court relies on platitudes about the hazards of relying on such legislative history. The Court correctly states:

> "Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Ante*, at 237.

I have no disagreement with these generalities; they simply have no relevance to this case. The "colloquies" referred to involve the drafters of the Act, are directed at the precise language of the grandfather clause, and either were addressed to the bill in its final form, or aimed at getting changes in the bill to deal with precisely the problem at issue in this case.

Failing to heed its own advice, the Court then would rely on the legislative history of the Act to discern a congressional purpose consistent with its interpretation of the statute. The Court concludes that the purpose of the grandfather clause was to prevent the proposed bill from becoming controversial. Once again, I have no disagreement with this general interpretation. But the Court misapprehends the aspects of the statute that Congress feared would be divisive. Congress concluded that it would be controversial for it to examine existing controls to determine whether they were justified by the exigencies of particular situations. H. R. Rep. No. 95–459, at 9–10. And Congress also felt it undesirable to force the President either to declare new national emergencies where none existed or to end restrictions without obtaining a *quid pro quo*. Accordingly, Congress decided that it would grandfather what the President already had done with respect to particular situations. The "controversy" that Congress hoped the grandfather clause would avert had nothing to do with the President's authority to respond to future situations.

The Court displays its utter confusion about this matter through its reliance on a quotation from the House Report that the Court believes supports its broad interpretation of the grandfather clause. In fact, the passage provides strong support for exactly the interpretation that the Court rejects. The passage reads:

> "Certain *current* uses of the authorities affected by H. R. 7738 are controversial—particularly the total U. S. trade embargoes of Cuba and Vietnam. The committee considered carefully whether to revise, or encourage the President to revise, such existing uses of international economic transaction controls, and thereby the policies they reflect, in this legislation. *The committee decided that to revise current uses, and to improve policies and procedures that will govern future uses, in a single bill would be difficult and divisive.* Committee members concluded that *improved procedures for future use of emergency international economic powers should take precedence over changing existing uses.* By 'grandfathering' existing uses of these powers, without either endorsing or disclaiming them, H. R. 7738 adheres to the committee's decision *to try to assure improved future uses rather than remedy possible past abuses.*" H. R. Rep. No. 95–459, at 9–10 (emphases added).

The Court's decision to quote this language, *ante*, at 239–240, is remarkable. By its terms, the quotation makes clear that the controversy Congress sought to avoid was that which would arise if Congress passed judgment on "existing uses of international economic transaction controls, and thereby the policies they reflect." Accordingly, Congress grandfathered them. It is also clear that the "existing uses" and "economic controls" and "policies" that Congress decided not to review included only "what has been done to date." Subcommittee Hearings, at 167 (remarks of Rep. Bingham). Congress had no hesitation about restricting the President's authority to exercise the emergency powers that he possessed but had not yet exercised. To the contrary, as the quotation on which the Court mistakenly relies makes absolutely clear, the primary purpose of the Act was to curtail "future uses" of precisely that residual authority.

Thus, it is equally remarkable for the Court to suggest that the purpose of the grandfather clause is to protect the President's authority to "respon[d] to heightened tensions with Cuba." *Ante*, at 240. If one thing is apparent from the legislative history of the Act, it is that Congress was not persuaded that the realities of the situation in Cuba constituted an emergency. See *supra*, at 247–249, 254–255. It is therefore somewhat incongruous to conclude that Congress intended to give the President greater flexibility to respond to developments in relations with Cuba than to events in other trouble spots around the world, such as Afghanistan, the Middle East, and Poland. With respect to future developments in such places, the IEEPA makes clear that the President cannot use his emergency powers to respond to "heightened tensions" unless the President has decided that a state of emergency exists, and has so declared. Nothing in the Court's opinion explains why Congress intended such unevenness in the President's authority to respond to future events; and it certainly is not self-evident why a less anomalous approach would have been "controversial."[6]

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[6] Even the manner in which Congress discussed the need for avoiding controversy on substantive issues suggests that Congress had no idea that the grandfather clause would be read in the manner in which the Court has interpreted it. Representative Bingham explained the reason for the grandfather clause:

"We have also in title I grandfathered in essentially those actions taken under the [TWEA] which it would be extremely difficult, if not impossible, The full incongruity of the Court's unsupported conclusion that Congress inserted the grandfather clause to preserve the President's "flexibility to adjust existing embargoes," *ante*, at 236, is perhaps even more apparent with respect to trade relations with China. In 1950, trade with China was halted by a general prohibition on unlicensed property transactions similar to the general prohibition on trade with Cuba. Compare 31 CFR § 500.201(b) (1977) (China) with 31 CFR § 515.201(b) (1977) (Cuba). In 1971, however, the President nullified this general prohibition by enacting an equally broad general license. 36 Fed. Reg. 8584. In detailing the exercises of authority under § 5(b) in effect at the time of the IEEPA, the House Report chronicled the history of trade restrictions with China as follows:

> "On May 8, 1971, the Department licensed most subsequent transactions with China, while continuing the blocking of Chinese assets in U. S. hands before that date. *This had the effect of lifting the U. S. trade embargo of China.* However, the embargoes of North Korea, Vietnam, Cambodia, and Cuba continue." H. R. Rep. No. 95-459, at 6 (emphasis added).

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to persuade the Congress to reverse at this time. I refer to the embargo against Cuba, the embargo against Vietnam and so on.

. . . . .

"I think for us to attempt to deal with those controversial substantive issues would be a mistake even though I personally favor lifting the embargo against Cuba and Vietnam." House Markup, at 2.

Obviously, Representative Bingham viewed grandfathering as an alternative to reviewing the regulations then currently in effect under § 5(b) and deciding which restrictions to lift. See also H. R. Rep. No. 95-459, at 11; Subcommittee Hearings, at 210 (remarks of Rep. Findley) (arguing that Congress should not grandfather and thereby give administration "easy way" to avoid resuming normal trade relations with other countries); *id.*, at 193 (statement of Rep. Bingham) (question of whether or not to grandfather is question of whether or not to "disturb" existing embargoes); *id.*, at 7-8 (statement of Rep. Bingham); see also House Markup, at 10 (remarks of Rep. Whalen) (grandfather clause gives President discretion to continue any *controls* currently in effect).

No other reference to extant trade embargoes refers to a trade embargo against China. See, *e. g.*, Subcommittee Hearings, at 108 (statement of Assistant Treasury Secretary Bergsten); House Markup, at 8 (statement of Rep. Bingham). Thus, in the eyes of Congress, the President was no longer exercising § 5(b) authorities with respect to trade with China even though a nullified general prohibition was still in effect. Congress presumably envisioned that the grandfather clause would preserve the freeze on Chinese assets, but that all subsequent controls on trade would be subject to the new IEEPA procedures.

The incongruity in the Court's analysis arises because the President's position in 1977 with respect to all trade with China was exactly like his position with respect to travel-related expenditures in Cuba. If the logic of the Court's opinion in this case is correct, Congress intended the grandfather clause in the IEEPA to preserve the President's authority to reinstitute a complete trade embargo with China simply by eliminating the general license that was in effect at the time that the IEEPA was passed.[7] There is no question that the Congress that enacted the IEEPA did not imagine that the grandfather clause preserved the President's authority to transform trade relations with another country from a situation of virtually free trade to a situation of complete embargo without following the IEEPA procedures. To use the Court's words, *ante*, at 235, it "does undue violence to the words chosen by Congress," to say nothing of congressional intent, to suggest that Congress considered the reimposition of a complete prohibition on trade with China as an "existing exercise" of § 5(b) authorities preserved by the grandfather clause. Surely, the reimposition of a complete embargo fits squarely within the "future uses" of emergency authorities to which Congress contemplated the new IEEPA procedures would apply. The situation presented in this case with respect to Cuba is no different, and it is equally clear that an increase in the embargo of Cuba is what Congress considered to be a "future use" of emergency authority not protected by the grandfather clause.

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[7] The petitioners attempt to discount this incongruity by arguing that the issue of whether the President could have reinstituted the Chinese embargo under the grandfather clause is "moot," since the President ended the use of § 5(b) authorities against China in 1980. See Reply Brief for Petitioners 15, n. 18. While it may be true that the President cannot now resurrect embargo powers under the grandfather clause with respect to China because he has allowed all § 5(b) authorities used against China to lapse, under the Court's analysis, the President would have been free to place a full embargo on China without complying with the IEEPA until such time as he allowed those powers to expire.

## III

Because the restrictions on travel-related expenditures in Cuba were not promulgated in conformity with the IEEPA and because there is no coherent reason to believe that Congress intended to preserve the President's authority to institute such restrictions without complying with the IEEPA, I respectfully dissent.

JUSTICE POWELL, dissenting.

As the petitioners argue, the judgment of the Court may well be in the best interest of the United States. The regulations upheld today limit Cuba's ability to acquire hard currency, currency that the Executive has found might be used to support violence and terrorism. Our role is limited, however, to ascertaining and sustaining the intent of Congress. It is the responsibility of the President and Congress to determine the course of the Nation's foreign affairs. In this case, the legislative history canvassed by JUSTICE BLACKMUN's dissenting opinion unmistakably demonstrates that Congress intended to bar the President from expanding the exercise of emergency authority under § 5(b). Contrary to the Court's view, the meaning of the word "authorities" in the grandfather clause is not "clear," see *ante*, at 237, nor in my view is it contrary to the fair import of this history.

# BACCHUS IMPORTS, LTD., ET AL. *v.* DIAS, DIRECTOR OF TAXATION OF HAWAII, ET AL.

## APPEAL FROM THE SUPREME COURT OF HAWAII

No. 82-1565. Argued January 11, 1984—Decided June 29, 1984

Hawaii imposes a 20% excise tax on sales of liquor at wholesale. But to encourage the development of the Hawaiian liquor industry, okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the State are exempted from the tax. Appellant liquor wholesalers, who sell to retailers at the wholesale price plus the tax, brought an action in the Hawaii Tax Appeal Court seeking a refund of taxes paid under protest and alleging that the tax is unconstitutional because it violates, *inter alia,* the Commerce Clause. The court rejected this constitutional claim, and the Hawaii Supreme Court affirmed, holding that the tax did not illegally discriminate against interstate commerce because the incidence of the tax is on the wholesalers and the ultimate burden is borne by consumers in Hawaii.

*Held:*

1. Appellants have standing to challenge the tax in this Court. Although they may pass the tax on to their customers, they are liable for it and must return it to the State whether or not their customers pay their bills. Moreover, even if the tax is passed on, it increases the price as compared to the exempted beverages, and appellants are entitled to litigate whether the tax has had an adverse competitive impact on their business. P. 267.

2. The tax exemption for okolehao and fruit wine violates the Commerce Clause, because it has both the purpose and effect of discriminating in favor of local products. Pp. 268–273.

(a) Neither the fact that sales of the exempted beverages constitute only a small part of the total liquor sales in Hawaii nor the fact that the exempted beverages do not present a "competitive threat" to other liquors is dispositive of the question whether competition exists between the exempt beverages and foreign beverages but only goes to the extent of such competition. On the facts, it cannot be said that no competition exists. Pp. 268–269.

(b) As long as there is some competition between the exempt beverages and nonexempt products from outside the State, there is a discriminatory effect. The Commerce Clause limits the manner in which a State may legitimately compete for interstate trade, for in the process of competition no State may discriminatorily tax products manufactured in any other State. Here, it cannot properly be concluded that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by consumers in Hawaii. Nor does the propriety of economic protectionism hinge upon characterizing the industry in question as "thriving" or "struggling." And it is irrelevant to the Commerce Clause inquiry that the legislature's motivation was the desire to aid the makers of the locally produced beverages rather than to harm out-of-state producers. Pp. 270–273.

3. The tax exemption is not saved by the Twenty-first Amendment. The exemption violates a central tenet of the Commerce Clause but is not supported by any clear concern of that Amendment in combating the evils of an unrestricted traffic in liquor. The central purpose of the Amendment was not to empower States to favor local liquor industry by erecting barriers to competition. Pp. 274–276.

4. This Court will not address the issues of whether, despite the unconstitutionality of the tax, appellants are entitled to tax refunds because the economic burden of the tax was passed on to their customers. These issues were not addressed by the state courts, federal constitutional issues may be intertwined with issues of state law, and resolution of the issues may necessitate more of a record than so far has been made. Pp. 276–277.

65 Haw. 566, 656 P. 2d 724, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 278. BRENNAN, J., took no part in the consideration or decision of the case.

*Frank H. Easterbrook* argued the cause for appellants. With him on the briefs were *Allan S. Haley*, *W. Reece Bader*, *Robert E. Freitas*, and *James A. Hughes*. *Bruce C. Bigelow* and *Eric K. Yamamoto* filed a brief for Foremost McKesson, Inc., as appellee under this Court's Rule 10.4, in support of appellants.

*William David Dexter*, Special Assistant Attorney General of Hawaii, argued the cause for appellee Dias. With him on the brief were *Tany S. Hong*, Attorney General, *T. Bruce Honda*, Deputy Attorney General, and *Kevin T. Wakayama*, Special Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the Distilled Spirits Council of the United States, Inc., by *Richard Stair Harrell*,

JUSTICE WHITE delivered the opinion of the Court.

Appellants challenge the constitutionality of the Hawaii liquor tax, which is a 20% excise tax imposed on sales of liquor at wholesale. Specifically at issue are exemptions from the tax for certain locally produced alcoholic beverages. The Supreme Court of Hawaii upheld the tax against challenges based upon the Equal Protection Clause, the Import-Export Clause, and the Commerce Clause. *In re Bacchus Imports, Ltd.*, 65 Haw. 566, 656 P. 2d 724 (1982). We noted probable jurisdiction *sub nom. Bacchus Imports, Ltd.* v. *Freitas*, 462 U. S. 1130 (1983), and now reverse.

## I

The Hawaii liquor tax was originally enacted in 1939 to defray the costs of police and other governmental services that the Hawaii Legislature concluded had been increased due to the consumption of liquor. At its inception the statute contained no exemptions. However, because the legislature sought to encourage development of the Hawaiian liquor industry, it enacted an exemption for okolehao from May 17, 1971, until June 20, 1981, and an exemption for fruit wine from May 17, 1976, until June 30, 1981.[1] Haw. Rev. Stat. §§244-4(6), (7) (Supp. 1983). Okolehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii. *In re Bacchus Imports, Ltd.*, *supra*, at 569, n. 7, 656 P. 2d, at 727, n. 7. The only fruit wine manufactured in Hawaii during the relevant time was pineapple wine. *Id.*, at 570, n. 8, 656 P. 2d, at 727, n. 8. Locally produced sake and fruit liqueurs are not exempted from the tax.

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*Russell W. Shannon*, and *Lawrence B. Gotlieb;* and for the Wine Institute by *Arnold M. Lerman*, *Daniel Marcus*, and *Ronald J. Greene*.

*Eugene F. Corrigan* filed a brief for the Multistate Tax Commission as *amicus curiae* urging affirmance.

[1] An exemption for okolehao that had been enacted in 1960 expired in 1965. 1960 Haw. Sess. Laws, ch. 26, § 1. During the pendency of this litigation, the Hawaii Legislature enacted a similar exemption for rum manufactured in the State for the period May 17, 1981, to June 30, 1986.

Appellants—Bacchus Imports, Ltd., and Eagle Distributors, Inc.—are liquor wholesalers who sell to licensed retailers.[2] They sell the liquor at their wholesale price plus the 20% excise tax imposed by § 244–4, plus a one-half percent tax imposed by Haw. Rev. Stat. § 237–13 (Supp. 1983). Pursuant to Haw. Rev. Stat. § 40–35 (Supp. 1983), which authorizes a taxpayer to pay taxes under protest and to commence an action in the Tax Appeal Court for the recovery of disputed sums, the wholesalers initiated protest proceedings and sought refunds of all taxes paid.[3] Their complaint alleged that the Hawaii liquor tax was unconstitutional because it violates both the Import-Export Clause[4] and the Commerce Clause[5] of the United States Constitution. The wholesalers sought a refund of approximately $45 million, representing all of the liquor tax paid by them for the years in question.[6]

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[2] Two other taxpayers—Foremost-McKesson, Inc., and Paradise Beverages, Inc.—were appellants in the consolidated suit in the Hawaii Supreme Court. They did not appeal to this Court and thus are appellees here pursuant to our Rule 10.4. For the sake of clarity, both appellants and appellee wholesalers will be referred to collectively as "wholesalers."

[3] Bacchus Imports, Ltd., was the first of the wholesalers to protest the assessment. It sent a letter dated May 30, 1979, protesting the payment of taxes for the period December 1977 through May 1979. Appellee Paradise Beverages, Inc., protested on July 30, 1979, for the period June 1977 through July 1979; appellant Eagle Distributors, Inc., protested on August 31, 1979, taxes paid from August 1974 through July 1979; and, on September 6, 1979, appellee Foremost-McKesson, Inc., protested taxes paid from August 1974 through August 1979. *In re Bacchus Imports, Ltd.*, 65 Haw. 566, 570, n. 11, 656 P. 2d 724, 728, n. 11 (1982).

[4] Article I, § 10, cl. 2, of the Constitution provides in part:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ."

[5] Article I, § 8, cl. 3, of the Constitution provides in part:

"The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ."

[6] Eagle Distributors sought refund of $10,744,047, App. 7; Bacchus sought $75,060.22, *id.*, at 13; Foremost-McKesson sought over $26 million, *id.*, at 19; and Paradise sought $8,716,727.23, Record in No. 1862, p. 27.

The Tax Appeal Court rejected both constitutional claims. On appeal, the Supreme Court of Hawaii affirmed the decision of the Tax Appeal Court and rejected an equal protection challenge as well. It held that the exemption was rationally related to the State's legitimate interest in promoting domestic industry and therefore did not violate the Equal Protection Clause. 65 Haw., at 573, 656 P. 2d, at 730. It further held that there was no violation of the Import-Export Clause because the tax was imposed on all local sales and uses of liquor, whether the liquor was produced abroad, in sister States, or in Hawaii itself. *Id.*, at 578–579, 656 P. 2d, at 732–733. Moreover, it found no evidence that the tax was applied selectively to discourage imports in a manner inconsistent with federal foreign policy or that it had any substantial indirect effect on the demand for imported liquor. *Ibid.* Turning to the Commerce Clause challenge, the Hawaii court held that the tax did not illegally discriminate against interstate commerce because "incidence of the tax . . . is on wholesalers of liquor in Hawaii and the ultimate burden is borne by consumers in Hawaii." *Id.*, at 581, 656 P. 2d, at 734.

## II

The State presents a claim not made below that the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax. The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court.[7]

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[7] The State also would have us avoid the merits by holding that the exemptions are severable and should not invalidate the entire tax. The

## III

A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959)). Despite the fact that the tax exemption here at issue seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao and pineapple wine, the State argues—and the Hawaii Supreme Court held—that there is no improper discrimination.

### A

Much of the State's argument centers on its contention that okolehao and pineapple wine do not compete with the other products sold by the wholesalers.[8] The State relies in part on statistics showing that for the years in question sales of okolehao and pineapple wine constituted well under one percent of the total liquor sales in Hawaii.[9] It also relies on the

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argument was not presented to the Supreme Court of Hawaii and that court did not proceed on any such basis. Furthermore, the challenged exemptions have now expired and "severance" would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but locally produced products were not.

[8] The State does not seriously defend the Hawaii Supreme Court's conclusion that because there was no discrimination between in-state and out-of-state *taxpayers* there was no Commerce Clause violation. Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers. Compare *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113 (1908), with *Maryland* v. *Louisiana*, 451 U. S. 725 (1981).

[9] The percentage of exempted liquor sales steadily increased from .2221% of total liquor sales in 1976 to .7739% in 1981. App. to Brief for Appellee Dias A–1.

statement by the Hawaii Supreme Court that "[w]e believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii," *In re Bacchus Imports, Ltd.*, 65 Haw., at 582, n. 21, 656 P. 2d, at 735, n. 21, as well as the court's comment that it had "good reason to believe neither okolehao nor pineapple wine is produced elsewhere." *Id.*, at 582, n. 20, 656 P. 2d, at 735, n. 20. However, neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages;[10] instead, they go only to the extent of such competition. It is well settled that "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland* v. *Louisiana*, 451 U. S. 725, 760 (1981).

The State's position that there is no competition is belied by its purported justification of the exemption in the first place. The legislature originally exempted the locally produced beverages in order to foster the local industries by encouraging increased consumption of their product. Surely one way that the tax exemption might produce that result is that drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit. Similarly, nondrinkers, such as the maturing young, might be attracted by the low prices of okolehao and pineapple wine. On the stipulated facts in this case, we are unwilling to conclude that no competition exists between the exempted and the nonexempted liquors.

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[10] The Hawaii Supreme Court's assumption that okolehao and pineapple wine do not pose "a competitive threat" does not constitute a finding that there is no competition whatsoever between locally produced products and out-of-state products, nor do we understand the State to so argue.

### B

The State contends that a more flexible approach, taking into account the practical effect and relative burden on commerce, must be employed in this case because (1) legitimate state objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). On the other hand, it acknowledges that where simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected. *Ibid.* See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471 (1981); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980).

A finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 352–353 (1977), or discriminatory effect, see *Philadelphia* v. *New Jersey*, *supra*. See also *Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, at 471, n. 15. Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. See *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). The Hawaii Supreme Court described the legislature's motivation in enacting the exemptions as follows:

> "The legislature's reason for exempting 'ti root okolehao' from the 'alcohol tax' was to 'encourage and promote the establishment of a new industry,' S. L. H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating 'the local fruit wine industry.' S. L. H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408–76, in 1976 Senate Journal, at

> 1056." *In re Bacchus Imports, Ltd., supra,* at 573–574, 656 P. 2d, at 730.

Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect.

No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to insure . . . against discriminating State legislation." *Welton* v. *Missouri,* 91 U. S. 275, 280 (1876). In *Welton,* the Court struck down a Missouri statute that "discriminat[ed] in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other states or countries. . . ." *Id.,* at 277. Similarly, in *Walling* v. *Michigan,* 116 U. S. 446, 455 (1886), the Court struck down a law imposing a tax on the sale of alcoholic beverages produced outside the State, declaring:

> "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

See also *I. M. Darnell & Son Co.* v. *Memphis,* 208 U. S. 113 (1908).

More recently, in *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977), the Court struck down a New York law that imposed a higher tax on transfers of stock occurring outside the State than on transfers involving a sale within the State. We observed that competition among the States for a share of interstate commerce is a central element of our free-trade policy but held that a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses. Thus, the Commerce Clause limits the manner in which States may legitimately compete for interstate trade, for "in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.*, at 337. It is therefore apparent that the Hawaii Supreme Court erred in concluding that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by consumers in Hawaii.

The State attempts to put aside this Court's cases that have invalidated discriminatory state statutes enacted for protectionist purposes. See *Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, at 471; *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36–37. The State would distinguish these cases because they all involved attempts "to enhance thriving and substantial business enterprises at the expense of any foreign competitors." Brief for Appellee Dias 30. Hawaii's attempt, on the other hand, was "to subsidize nonexistent (pineapple wine) and financially troubled (okolehao) liquor industries peculiar to Hawaii." *Id.*, at 33. However, we perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises under these circumstances, and the State cites no authority for its proposed distinction. In either event, the legislation constitutes "economic protectionism" in every sense of the phrase. It has long been the law that States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy* v. *Baltimore*, 100 U. S. 434, 443

(1880). Were it otherwise, "the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.*, at 442. It was to prohibit such a "multiplication of preferential trade areas" that the Commerce Clause was adopted. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951). Consequently, the propriety of economic protectionism may not be allowed to hinge upon the State's—or this Court's—characterization of the industry as either "thriving" or "struggling."

We also find unpersuasive the State's contention that there was no discriminatory intent on the part of the legislature because "the exemptions in question were not enacted to discriminate against foreign products, but rather, to promote a local industry." Brief for Appellee Dias 40. If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.

We therefore conclude that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.[11]

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[11] Because of our disposition of the Commerce Clause issue, we need not address the wholesalers' arguments based upon the Equal Protection Clause and the Import-Export Clause.

## IV

The State argues in this Court that even if the tax exemption violates ordinary Commerce Clause principles, it is saved by the Twenty-first Amendment to the Constitution.[12] Section 2 of that Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment,[13] more recently we have recognized the obscurity of the legislative history of § 2. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 107, n. 10 (1980). No clear consensus concerning the meaning of the provision is apparent. Indeed, Senator Blaine, the Senate sponsor of the Amendment resolution, appears to have espoused varying interpretations. In reporting the view of the Senate Judiciary Committee, he said that the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors . . . ." 76 Cong. Rec. 4143 (1933). On the other hand, he also expressed a narrower view: "So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.*, at 4141.

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[12] We note that the State expressly disclaimed any reliance upon the Twenty-first Amendment in the court below and did not cite it in its motion to dismiss or affirm. Apparently it was not until it prepared its brief on the merits in this Court that it became "clear" to the State that the Amendment saves the challenged tax. See Brief for Appellee Dias 36.

[13] For example, in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936), the Court stated:

> "The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

The Court went on to observe, however, that a high license fee for importation may "serve as an aid in policing the liquor traffic." *Id.*, at 63.

See also *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, 403 (1938) ("since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor"). Cf. *Craig* v. *Boren*, 429 U. S. 190 (1976).

It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause. For example, in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331–332 (1964), the Court stated:

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."

We also there observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. Similarly, in *Midcal Aluminum*, *supra*, at 109, the Court, noting that recent Twenty-first Amendment cases have emphasized federal interests to a greater degree than had earlier cases, described the mode of analysis to be employed as a "pragmatic effort to harmonize state and federal powers." The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 714 (1984).

Approaching the case in this light, we are convinced that Hawaii's discriminatory tax cannot stand. Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82 (1984); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935). State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry." Brief for Appellee Dias 40. Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment.

## V

The State further contends that even if the challenged tax is adjudged to have been unconstitutionally discriminatory and should not have been collected from the wholesalers as long as the exemptions for local products were in force, the wholesalers are not entitled to refunds since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay within a certain time. Relying on *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934), a case involving interpretation of a federal tax refund statute, the State asserts that only the parties bearing the economic incidence of the tax are constitutionally entitled to a refund of an illegal tax. It further asserts that the wholesalers, at least arguably, do not even bear the legal obligation for the tax and that they have shown no competitive injury from the alleged discrimination. The wholesalers assert, on the other hand, that they were liable to pay the tax whether or not their customers paid their bills on time and that if the tax was illegally discriminatory the Commerce Clause requires that the taxes collected be refunded to them. Their position is also that the discrimination has worked a competitive injury on their business that entitles them to a refund.

These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.[14] Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion.

*So ordered.*

JUSTICE BRENNAN took no part in the consideration or decision of this case.

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[14] It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law.

JUSTICE STEVENS, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Four wholesalers of alcoholic beverages filed separate complaints challenging the constitutionality of the Hawaii liquor tax because pursuant to an exception, since expired, the tax was not imposed on okolehao or pineapple wine in certain tax years.[1] Although only one of them actually sells okolehao and pineapple wine,[2] apparently all four of them are entitled to engage in the wholesale sale of these beverages as well as the various other alcoholic beverages that they do sell. The tax which they challenge is an excise tax amounting to 20 percent of the wholesale price; presumably the economic burden of the tax is passed on to the wholesalers' customers.

Today the Court holds that these wholesalers are "entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Ante*, at 267. I am skeptical about the ability of the wholesalers to prove that the exemption for okolehao and pineapple wine has harmed their businesses at all, partly because their customers have reimbursed them for the excise tax and partly because they are free to take advantage of the benefit of the exemption by selling the exempted products themselves. Even if some minimal harm can be proved, I am even more skeptical about the possibility that it will result in the multimillion-dollar refund that the wholesalers are claiming. My skepticism concerning the economics of the wholesalers' position is not, however, the basis for my dissent. I would affirm the judgment of the Supreme Court of Hawaii because the wholesalers' Commerce Clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution.[3]

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[1] Two of the wholesalers Bacchus Imports, Ltd., and Eagle Distributors, Inc., are appellants in this Court; the other two, Paradise Beverages, Inc., and Foremost-McKesson, Inc., are nominally appellees under our Rules, see *ante*, at 266, n. 2, but have filed briefs supporting reversal. All four were parties to the case in the Hawaiian Supreme Court.

[2] As the Supreme Court of Hawaii noted:

"Paradise acknowledges it is a 'beneficiary' of the exemptions from taxation provided by HRS § 244.4 for okolehao and fruit wine produced in Hawaii. It nevertheless maintains the statute is unconstitutional probably because the volume of sales of the exempted products is relatively insubstantial." *In re Bacchus Imports, Ltd.*, 65 Haw. 566, 570, n. 9, 656 P. 2d 724, 727, n. 9 (1982).

## I

At the outset, it is of critical importance to a proper understanding of the significance of the Twenty-first Amendment in this litigation to note the issues this case does not raise. First, there is no claim that the Hawaii tax is inconsistent with any exercise of the power that Art. I, §8, cl. 3, of the Constitution confers upon the Congress "To regulate Commerce among . . . the several States." The extent to which the Twenty-first Amendment may or may not have placed limits on the ability of Congress to regulate commerce in alcoholic beverages is simply not at issue in this case. Hence, there is no issue concerning the continuing applicability of previously enacted federal statutes affecting the liquor industry.[4] For purposes of analysis, we may assume, *arguendo*, that the Twenty-first Amendment left the power of *Congress* entirely unimpaired.[5]

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[3] As the Court recognizes, the issue whether the Twenty-first Amendment insulates the exemption from invalidation under the Commerce Clause is properly before us, even though it was not argued below. I should add that the wholesalers' specific Equal Protection Clause claim is plainly foreclosed under the Twenty-first Amendment as well, see, *e. g.*, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938), and their Import-Export Clause claim is wholly lacking in merit, see, *e. g.*, *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964).

[4] See generally *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); see also *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 282, n. 9 (1972).

[5] The Commerce Clause operates both as a grant of power to the Congress and a limitation on the power of the States concerning interstate commerce. Congress' power under the Clause, however, is broader than the limitation inherently imposed on the States, and hence we have always

Moreover, there is no claim that the Hawaii tax has impaired interstate commerce that merely passes through the State,[6] or that is destined to terminate at a federal enclave within the State.[7] Nor is there a claim of a due process violation,[8] nor a claim of discrimination among persons, as opposed to goods,[9] nor a claim of an effect on liquor prices outside the State.[10]

The tax is applied to the sale of liquor in the local market that presumably will be consumed in Hawaii. It thus falls squarely within the protection given to Hawaii by the second section of the Twenty-first Amendment, which expressly mentions "delivery or use therein."[11]

## II

Prior to the adoption of constitutional Amendments concerning intoxicating liquors, there was a long history of special state and federal legislation respecting intoxicating liquors and resulting litigation challenging that legislation

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recognized that some state regulation of interstate commerce is permissible which would be impermissible if Congress acted. *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). Given the dual character of the Clause, it is not at all incongruous to assume that the power delegated to Congress by the Commerce Clause is unimpaired while holding the inherent limitation imposed by the Commerce Clause on the States is removed with respect to intoxicating liquors by the Twenty-first Amendment.

[6] See generally *Department of Revenue* v. *James B. Beam Distilling Co.*, *supra; Carter* v. *Virginia*, 321 U. S. 131 (1944).

[7] See generally *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363 (1973); *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938).

[8] See generally *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971).

[9] See generally *Craig* v. *Boren*, 429 U. S. 190 (1976).

[10] See generally *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966); compare *United States Brewers Assn., Inc.* v. *Rodriquez*, 465 U. S. 1093 (1984) (summarily dismissing appeal from 100 N. M. 216, 668 P. 2d 1093 (1983)), with *Healy* v. *United States Brewers Assn., Inc.*, 464 U. S. 909 (1983) (summarily aff'g 692 F. 2d 275 (CA2 1982)).

[11] See *infra*, at 281.

under the Commerce Clause.[12] The Commerce Clause effectively prevented States from unilaterally banning the local sale of intoxicating liquors from out of state, *Leisy* v. *Hardin*, 135 U. S. 100 (1890), but Congress, acting pursuant to its plenary power under the Commerce Clause, essentially conferred that authority on them, and this Court upheld that exercise of congressional power. *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917). The Eighteenth Amendment, ratified in 1919, prohibited the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, and expressly conferred concurrent power to enforce the prohibition on Congress and the several States.[13] Section 1 of the Twenty-first Amendment, ratified in 1933, repealed the Eighteenth Amendment. However, the constitutional authority of the States to regulate commerce in intoxicating liquors did not revert to its status prior to the adoption of these constitutional Amendments; § 2 of the Twenty-first Amendment expressly provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This Court immediately recognized that this broad constitutional language confers power upon the States to regulate commerce in intoxicating liquors unconfined by ordinary limitations imposed on state regulation of interstate goods by the Commerce Clause and other constitutional provisions, *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Finch & Co.* v.

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[12] See, *e. g.*, *United States* v. *Hill*, 248 U. S. 420 (1919); *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917); *In re Rahrer*, 140 U. S. 545 (1891); *Leisy* v. *Hardin*, 135 U. S. 100 (1890); *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888); *Walling* v. *Michigan*, 116 U. S. 446 (1886); *License Cases*, 5 How. 504 (1847), overruled, *Leisy* v. *Hardin*, *supra*.

[13] See generally *The National Prohibition Cases*, 253 U. S. 350 (1920).

*McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), and we have consistently reaffirmed that understanding of the Amendment, repeatedly acknowledging the broad nature of state authority to regulate commerce in intoxicating liquors, see, *e. g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 712 (1984); *Craig* v. *Boren*, 429 U. S. 190, 206–207 (1976); *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 283–284 (1972); *California* v. *LaRue*, 409 U. S. 109, 114–115 (1972); *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330 (1964); *Nippert* v. *Richmond*, 327 U. S. 416, 425 (1946); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 299 (1945).

## III

Today the Court, in essence, holds that the Hawaii tax is unconstitutional because it places a burden on intoxicating liquors that have been imported into Hawaii for use therein that is not imposed on liquors that are produced locally. As I read the text of the Amendment, it expressly authorizes this sort of burden. Moreover, as I read Justice Brandeis' opinion for the Court in the seminal case of *State Board of Equalization* v. *Young's Market Co.*, *supra*, the Court has squarely so decided.

In *Young's Market*, the Court upheld a California statute that imposed a license fee on the privilege of importing beer to any place in California. After noting that the statute would have been obviously unconstitutional prior to the Twenty-first Amendment, the Court explained that the Amendment enables a State to establish a local monopoly and to prevent or discourage competition from imported liquors. Because the Court's reasoning clearly covers this case, it merits quotation at some length:

> "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state

'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

"The plaintiffs argue that, despite the Amendment, a State may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare *Slaughter-House Cases*, 16 Wall. 36; *Vance* v. *W. A. Vandercook Co. (No. 1)*, 170 U. S. 438, 447. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting hard liquors absolutely. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?" 299 U. S., at 62–63.

Today the Court implies that Justice Brandeis' reasoning in the *Young's Market* case has been qualified by our more recent decision in *Hostetter* v. *Idlewild Bon Voyage Liquor*

*Corp.*, *supra*. However, in the passage quoted by the Court, *ante*, at 275, Justice Stewart merely rejected the broad proposition that the Twenty-first Amendment had entirely divested Congress of all regulatory power over interstate or foreign commerce in intoxicating liquors. As I have already noted, this case involves no question concerning the power of Congress, see *supra*, at 279, and n. 4, and Justice Brandeis of course in no way implied that Congress had been totally divested of authority to regulate commerce in intoxicating liquors—a proposition which Justice Stewart characterized as "patently bizarre." 377 U. S., at 332.

Moreover, the actual decision in *Hostetter* was predicated squarely on the principle reflected in the Court's earlier decision in *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938). Referring to *Collins*, the Court explained:

> "There it was held that the Twenty-first Amendment did not give California power to prevent the shipment into and through her territory of liquor destined for distribution and consumption in a national park. The Court said that this traffic did not involve 'transportation into California "for delivery or use therein"' within the meaning of the Amendment. 'The delivery and use is in the Park, and under a distinct sovereignty.' *Id.*, at 538. This ruling was later characterized by the Court as holding 'that shipment through a state is not transportation or importation into the state within the meaning of the Amendment.' *Carter* v. *Virginia*, 321 U. S. 131, 137." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S., at 332.[14]

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[14] The Court added:

"A like accommodation of the Twenty-first Amendment with the Commerce Clause leads to a like conclusion in the present case. Here, ultimate delivery and use is not in New York, but in a foreign country. The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this

On the same day that it decided *Hostetter*, the Court also held that a Kentucky tax violated the Export-Import Clause of the Constitution. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964). The holding of that case is not relevant to the Commerce Clause issue decided today, but the final paragraph of the Court's opinion in the *James B. Beam Distilling Co.* case surely confirms my understanding that the Court did not then think that it was repudiating the central rationale of Justice Brandeis' opinion in *Young's Market*. It wrote:

> "We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad." 377 U. S., at 346.

Indeed, only 11 days ago, we stated that a direct regulation on "the sale or use of liquor" within a State's borders is the "core § 2 power" conferred upon a State, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S., at 713, observing:

> "'This Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.' [Section] 2 reserves

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case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F. Supp., at 386. Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do." 377 U. S., at 333–334.

> to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id.*, at 712 (citation omitted).

As a matter of pure constitutional power, Hawaii may surely prohibit the importation of all intoxicating liquors. It seems clear to me that it may do so without prohibiting the local sale of liquors that are produced within the State. In other words, even though it seems unlikely that the okolehao lobby could persuade it to do so, the Hawaii Legislature surely has the power to create a local monopoly by prohibiting the sale of any other alcoholic beverage. If the State has the constitutional power to create a total local monopoly—thereby imposing the most severe form of discrimination on competing products originating elsewhere—I believe it may also engage in a less extreme form of discrimination that merely provides a special benefit, perhaps in the form of a subsidy or a tax exemption, for locally produced alcoholic beverages.

The Court's contrary conclusion is based on the "obscurity of the legislative history" of §2. *Ante*, at 274. What the Court ignores is that it was argued in *Young's Market* that a "limitation of the broad language" of §2 was "sanctioned by its history," but the Court, observing that the language of the Amendment was "clear," determined that it was unnecessary to consider the history, 299 U. S., at 63–64—the history which the Court today considers unclear. But now, according to the Ccurt, the force of the Twenty-first Amendment contention in this case is diminished because the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Ante*, at 276. It follows, according to the Court, that "state laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Ibid.* This is a totally novel approach to the Twenty-first Amendment.[15] The question is not one of "deference," nor one of "central purposes";[16] the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is.

Accordingly, I respectfully dissent.

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[15] It is an approach explicitly rejected in *Young's Market*, 299 U. S., at 63 (rejecting argument that the "State may not regulate importations except for the purpose of protecting the public health, safety or morals . . ."), and in subsequent cases as well, see, *e. g.*, *Seagram & Sons* v. *Hostetter*, 384 U. S., at 47 ("[N]othing in the Twenty-first Amendment . . . requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance"). Because it makes the constitutionality of state legislation depend on a judicial evaluation of the motivation of the legislators, I regard it as an unsound approach to the adjudication of federal constitutional issues. Indeed, it is reminiscent of a long since repudiated era in which this Court struck down assertions of Congress' power to regulate commerce on the ground that the objective of Congress was not to regulate commerce, but rather to remedy some local problem. See generally *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). In any event, the Court's analysis must fall of its own weight, for we do not know what the ultimate result of a regulation such as this may be. The immediate objective may be to encourage the growth of domestic distilleries, but the ultimate result—or indeed, objective—may be entirely to prohibit imported liquors for domestic consumption when the domestic industry has matured.

[16] I would suggest, however, that if vague balancing of "central purposes" is to govern the ultimate disposition of this litigation, a careful and thorough analysis of the actual economic effect of the tax exemption on the business of the taxpayers should be made before any serious consideration is given to their multimillion-dollar refund claim.

# CLARK, SECRETARY OF THE INTERIOR, ET AL. *v.* COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82–1998. Argued March 21, 1984—Decided June 29, 1984

In 1982, the National Park Service issued a permit to respondent Community for Creative Non-Violence (CCNV) to conduct a demonstration in Lafayette Park and the Mall, which are National Parks in the heart of Washington, D. C. The purpose of the demonstration was to call attention to the plight of the homeless, and the permit authorized the erection of two symbolic tent cities. However, the Park Service, relying on its regulations—particularly one that permits "camping" (defined as including sleeping activities) only in designated campgrounds, no campgrounds having ever been designated in Lafayette Park or the Mall—denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents. CCNV and the individual respondents then filed an action in Federal District Court, alleging, *inter alia,* that application of the regulations to prevent sleeping in the tents violated the First Amendment. The District Court granted summary judgment for the Park Service, but the Court of Appeals reversed.

*Held:* The challenged application of the Park Service regulations does not violate the First Amendment. Pp. 293–299.

(a) Assuming that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment, the regulation forbidding sleeping meets the requirements for a reasonable time, place, or manner restriction of expression, whether oral, written, or symbolized by conduct. The regulation is neutral with regard to the message presented, and leaves open ample alternative methods of communicating the intended message concerning the plight of the homeless. Moreover, the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of the Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping would be totally inimical to these purposes. The validity of the regulation need not be judged solely by reference to the demonstration at hand, and none of its provisions are unrelated to the ends that it was designed to serve. Pp. 293–298.

(b) Similarly, the challenged regulation is also sustainable as meeting the standards for a valid regulation of expressive conduct. Aside from its impact on speech, a rule against camping or overnight sleeping in public parks is not beyond the constitutional power of the Government to enforce. And as noted above, there is a substantial Government interest, unrelated to suppression of expression, in conserving park property that is served by the proscription of sleeping. Pp. 298–299.

227 U. S. App. D. C. 19, 703 F. 2d 586, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 300. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 301.

*Deputy Solicitor General Bator* argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Alan I. Horowitz*, *Leonard Schaitman*, and *Katherine S. Gruenheck*.

*Burt Neuborne* argued the cause for respondents. With him on the brief were *Charles S. Sims*, *Laura Macklin*, *Arthur B. Spitzer*, and *Elizabeth Symonds*.*

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether a National Park Service regulation prohibiting camping in certain parks violates the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless. We hold that it does not and reverse the contrary judgment of the Court of Appeals.

## I

The Interior Department, through the National Park Service, is charged with responsibility for the management and maintenance of the National Parks and is authorized to promulgate rules and regulations for the use of the parks in accordance with the purposes for which they were established.

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**Ogden Northrop Lewis* filed a brief for the National Coalition for the Homeless as *amicus curiae* urging affirmance.

16 U. S. C. §§1, 1a–1, 3.[1] The network of National Parks includes the National Memorial-core parks, Lafayette Park and the Mall, which are set in the heart of Washington, D. C., and which are unique resources that the Federal Government holds in trust for the American people. Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a "garden park with a . . . formal landscaping of flowers and trees, with fountains, walks and benches." National Park Service, U. S. Department of the Interior, White House and President's Park, Resource Management Plan 4.3 (1981). The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. It is bordered by, *inter alia*, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country, as well as by large numbers of residents of the Washington metropolitan area.

Under the regulations involved in this case, camping in National Parks is permitted only in campgrounds designated for that purpose. 36 CFR §50.27(a) (1983). No such campgrounds have ever been designated in Lafayette Park or the Mall. Camping is defined as

> "the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the pur-

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[1] The Secretary is admonished to promote and regulate the use of the parks by such means as conform to the fundamental purpose of the parks, which is "to conserve the scenery and the natural and historic objects and the wild life therein . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 39 Stat. 535, as amended, 16 U. S. C. §1.

> pose of sleeping), or storing personal belongings, or making any fire, or using any tents or . . . other structure . . . for sleeping or doing any digging or earth breaking or carrying on cooking activities." *Ibid.*

These activities, the regulation provides,

> "constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." *Ibid.*

Demonstrations for the airing of views or grievances are permitted in the Memorial-core parks, but for the most part only by Park Service permits. 36 CFR § 50.19 (1983). Temporary structures may be erected for demonstration purposes but may not be used for camping. 36 CFR § 50.19(e)(8) (1983).[2]

In 1982, the Park Service issued a renewable permit to respondent Community for Creative Non-Violence (CCNV) to conduct a wintertime demonstration in Lafayette Park and the Mall for the purpose of demonstrating the plight of the homeless. The permit authorized the erection of two symbolic tent cities: 20 tents in Lafayette Park that would accommodate 50 people and 40 tents in the Mall with a capacity of up to 100. The Park Service, however, relying on the above regulations, specifically denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents.

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[2] Section 50.19(e)(8), as amended, prohibits the use of certain temporary structures:

"In connection with permitted demonstrations or special events, temporary structures may be erected for the purpose of symbolizing a message or meeting logistical needs such as first aid facilities, lost children areas or the provision of shelter for electrical and other sensitive equipment or displays. Temporary structures may not be used outside designated camping areas for living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging."

CCNV and several individuals then filed an action to prevent the application of the no-camping regulations to the proposed demonstration, which, it was claimed, was not covered by the regulation. It was also submitted that the regulations were unconstitutionally vague, had been discriminatorily applied, and could not be applied to prevent sleeping in the tents without violating the First Amendment. The District Court granted summary judgment in favor of the Park Service. The Court of Appeals, sitting en banc, reversed. *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 703 F. 2d 586 (1983). The 11 judges produced 6 opinions. Six of the judges believed that application of the regulations so as to prevent sleeping in the tents would infringe the demonstrators' First Amendment right of free expression. The other five judges disagreed and would have sustained the regulations as applied to CCNV's proposed demonstration.[3] We granted the Government's petition for certiorari, 464 U. S. 1016 (1983), and now reverse.[4]

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[3] The *per curiam* opinion preceding the individual opinions described the lineup of the judges as follows:

"Circuit Judge Mikva files an opinion, in which Circuit Judge Wald concurs, in support of a judgment reversing. Chief Judge Robinson and Circuit Judge Wright file a statement joining in the judgment and concurring in Circuit Judge Mikva's opinion with a caveat. Circuit Judge Edwards files an opinion joining in the judgment and concurring partially in Circuit Judge Mikva's opinion. Circuit Judge Ginsburg files an opinion joining in the judgment. Circuit Judge Wilkey files a dissenting opinion, in which Circuit Judges Tamm, MacKinnon, Bork and Scalia concur. Circuit Judge Scalia files a dissenting opinion, in which Circuit Judges MacKinnon and Bork concur." 227 U. S. App. D. C., at 19–20, 703 F. 2d, at 586–587.

[4] As a threshold matter, we must address respondents' contention that their proposed activities do not fall within the definition of "camping" found

## II

We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment.[5] We assume for present purposes, but do not decide, that such is the case, cf. *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), but this assumption only begins the inquiry. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984); *United States* v. *Grace*, 461 U. S. 171 (1983); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983); *Heffron* v. *International Society for Krishna Consciousness*,

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in the regulations. None of the opinions below accepted this contention, and at least nine of the judges expressly rejected it. *Id.*, at 24, 703 F. 2d, at 591 (opinion of Mikva, J.); *id.*, at 42, 703 F. 2d, at 609 (opinion of Wilkey, J.). We likewise find the contention to be without merit. It cannot seriously be doubted that sleeping in tents for the purpose of expressing the plight of the homeless falls within the regulation's definition of camping.

[5] We reject the suggestion of the plurality below, however, that the burden on the demonstrators is limited to "the advancement of a plausible contention" that their conduct is expressive. *Id.*, at 26, n. 16, 703 F. 2d, at 593, n. 16. Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.

*Inc.*, 452 U. S. 640, 647–648 (1981); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976); *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 535 (1980).

It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. *Spence* v. *Washington*, 418 U. S. 405 (1974); *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969). Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. *United States* v. *O'Brien*, *supra*.

Petitioners submit, as they did in the Court of Appeals, that the regulation forbidding sleeping is defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct. We agree with that assessment. The permit that was issued authorized the demonstration but required compliance with 36 CFR §50.19 (1983), which prohibits "camping" on park lands, that is, the use of park lands for living accommodations, such as sleeping, storing personal belongings, making fires, digging, or cooking. These provisions, including the ban on sleeping, are clearly limitations on the manner in which the demonstration could be carried out. That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid. *City Council of Los Angeles* v. *Taxpayers for Vincent*, *supra*; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*; *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). Neither does the fact that sleeping, *arguendo*, may be expressive conduct, rather than oral or written expression, render the sleeping prohibition any less a time, place, or manner regulation. To the contrary, the Park Service neither attempts to ban sleeping generally nor to ban it everywhere in the parks. It has established areas for camping and forbids it elsewhere, including Lafayette Park and the Mall. Considered as such, we have very little trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here.

The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented.[6] Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

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[6] Respondents request that we remand to the Court of Appeals for resolution of their claim that the District Court improperly granted summary judgment on the equal protection claim. Brief for Respondents 91, n. 50. They contend that there were disputed questions of fact concerning the uniformity of enforcement of the regulation, claiming that other groups have slept in the parks. The District Court specifically found that the regulations have been consistently applied and enforced in a fair and nondiscriminatory manner. App. to Pet. for Cert. 106a–108a. Only 5 of the 11 judges in the Court of Appeals addressed the equal protection claim. 227 U. S. App. D. C., at 43–44, 703 F. 2d, at 610–611 (opinion of Wilkey, J., joined by Tamm, MacKinnon, Bork, and Scalia, JJ.). Our review of the record leads us to agree with their conclusion that there is no genuine issue of material fact and that the most that respondents have shown are isolated instances of undiscovered violations of the regulations.

It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping—using these areas as living accommodations—would be totally inimical to these purposes, as would be readily understood by those who have frequented the National Parks across the country and observed the unfortunate consequences of the activities of those who refuse to confine their camping to designated areas.

It is urged by respondents, and the Court of Appeals was of this view, that if the symbolic city of tents was to be permitted and if the demonstrators did not intend to cook, dig, or engage in aspects of camping other than sleeping, the incremental benefit to the parks could not justify the ban on sleeping, which was here an expressive activity said to enhance the message concerning the plight of the poor and homeless. We cannot agree. In the first place, we seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people. Furthermore, although we have assumed for present purposes that the sleeping banned in this case would have an expressive element, it is evident that its major value to this demonstration would be facilitative. Without a permit to sleep, it would be difficult to get the poor and homeless to participate or to be present at all. This much is apparent from the permit application filed by respondents: "Without the incentive of sleeping space or a hot meal, the homeless would not come to the site." App. 14. The sleeping ban, if enforced, would thus effectively limit the nature, extent, and duration of the demonstration and to that extent ease the pressure on the parks.

Beyond this, however, it is evident from our cases that the validity of this regulation need not be judged solely by reference to the demonstration at hand. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S., at 652–653. Absent the prohibition on sleeping, there would be other groups who would demand permission to deliver an asserted message by camping in Lafayette Park. Some of them would surely have as credible a claim in this regard as does CCNV, and the denial of permits to still others would present difficult problems for the Park Service. With the prohibition, however, as is evident in the case before us, at least some around-the-clock demonstrations lasting for days on end will not materialize, others will be limited in size and duration, and the purposes of the regulation will thus be materially served. Perhaps these purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas. But the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out. As in *City Council of Los Angeles* v. *Taxpayers for Vincent*, the regulation "responds precisely to the substantive problems which legitimately concern the [Government]." 466 U. S., at 810.

We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, or manner regulation that withstands constitutional scrutiny. Surely the regulation is not unconstitutional on its face. None of its provisions appears unrelated to the ends that it was designed to serve. Nor is it any less valid when applied to prevent camping in Memorial-core parks by those who wish to demonstrate and deliver a message to the public and the central Government. Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by nondemonstrators. In neither case must the Government tolerate it. All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace.[7] This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable.

Contrary to the conclusion of the Court of Appeals, the foregoing analysis demonstrates that the Park Service regulation is sustainable under the four-factor standard of *United States* v. *O'Brien*, 391 U. S. 367 (1968), for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.[8] No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce. And for the reasons we have discussed above, there is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to suppression of expression.

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[7] When the Government seeks to regulate conduct that is ordinarily nonexpressive it may do so regardless of the situs of the application of the regulation. Thus, even against people who choose to violate Park Service regulations for expressive purposes, the Park Service may enforce regulations relating to grazing animals, 36 CFR § 50.13 (1983); flying model planes, § 50.16; gambling, § 50.17; hunting and fishing, § 50.18; setting off fireworks, § 50.25(g); and urination, § 50.26(b).

[8] Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech. Thus, if the time, place, or manner restriction on expressive sleeping, if that is what is involved in this case, sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served. We note that only recently, in a case dealing with the regulation of signs, the Court framed the issue under *O'Brien* and then based a crucial part of its analysis on the time, place, or manner cases. *City Coun-*

We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. There is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to Lafayette Park and the Mall. The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage, whether by sleeping or otherwise, and these suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States* v. *O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.[9]

Accordingly, the judgment of the Court of Appeals is

*Reversed.*

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*cil of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804–805, 808–810 (1984).

[9] We also agree with Judge Edwards' observation that "[t]o insist upon a judicial resolution of this case, given the facts and record at hand, argu-

CHIEF JUSTICE BURGER, concurring.

I concur fully in the Court's opinion.

I find it difficult to conceive of what "camping" means, if it does not include pitching a tent and building a fire. Whether sleeping or cooking follows is irrelevant. With all its frailties, the English language, as used in this country for several centuries, and as used in the Park Service regulations, could hardly be plainer in informing the public that camping in Lafayette Park was prohibited.

The actions here claimed as speech entitled to the protections of the First Amendment simply are not speech; rather, they constitute conduct. As Justice Black, who was never tolerant of limits on speech, emphatically pointed out in his separate opinion in *Cox* v. *Louisiana*, 379 U. S. 536, 578 (1965):

> "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes*. . . . Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." (Emphasis in original; citations omitted.)

Respondents' attempt at camping in the park is a form of "picketing"; it is conduct, not speech. Moreover, it is conduct that interferes with the rights of others to use Lafayette Park for the purposes for which it was created. Lafayette Park and others like it are for all the people, and their rights are not to be trespassed even by those who have some "statement" to make. Tents, fires, and sleepers, real or feigned, interfere with the rights of others to use our parks. Of

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ably suggests a lack of common sense." 227 U. S. App. D. C., at 33, 703 F. 2d at 600. Nor is it any clearer to us than it was to him "what has been achieved by this rather exhausting expenditure of judicial resources." *Id.*, at 34, 703 F. 2d, at 601.

course, the Constitution guarantees that people may make their "statements," but Washington has countless places for the kind of "statement" these respondents sought to make.

It trivializes the First Amendment to seek to use it as a shield in the manner asserted here. And it tells us something about why many people must wait for their "day in court" when the time of the courts is pre-empted by frivolous proceedings that delay the causes of litigants who have legitimate, nonfrivolous claims. This case alone has engaged the time of 1 District Judge, an en banc court of 11 Court of Appeals Judges, and 9 Justices of this Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court's disposition of this case is marked by two related failings. First, the majority is either unwilling or unable to take seriously the First Amendment claims advanced by respondents. Contrary to the impression given by the majority, respondents are not supplicants seeking to wheedle an undeserved favor from the Government. They are citizens raising issues of profound public importance who have properly turned to the courts for the vindication of their constitutional rights. Second, the majority misapplies the test for ascertaining whether a restraint on speech qualifies as a reasonable time, place, and manner regulation. In determining what constitutes a sustainable regulation, the majority fails to subject the alleged interests of the Government to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of uneccessary limitations.

## I

The proper starting point for analysis of this case is a recognition that the activity in which respondents seek to engage—sleeping in a highly public place, outside, in the winter for the purpose of protesting homelessness—is symbolic speech protected by the First Amendment. The majority assumes, without deciding, that the respondents' conduct is entitled to constitutional protection. *Ante*, at 293. The problem with this assumption is that the Court thereby avoids examining closely the reality of respondents' planned expression. The majority's approach denatures respondents' asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgment. A realistic appraisal of the competing interests at stake in this case requires a closer look at the nature of the expressive conduct at issue and the context in which that conduct would be displayed.

In late autumn of 1982, respondents sought permission to conduct a round-the-clock demonstration in Lafayette Park and on the Mall. Part of the demonstration would include homeless persons sleeping outside in tents without any other amenities.[1] Respondents sought to begin their demonstration on a date full of ominous meaning to any homeless person: the first day of winter. Respondents were similarly purposeful in choosing demonstration sites. The Court portrays these sites—the Mall and Lafayette Park—in a peculiar fashion. According to the Court:

> "Lafayette Park and the Mall . . . are unique resources that the Federal Government holds in trust for the American people. Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a 'garden park with a . . . formal landscaping of flowers and trees, with fountains, walks and benches.' . . . The Mall is a

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[1] The previous winter respondents had held a similar demonstration after courts ruled that the Park Service regulations then in effect did not extend to respondents' proposed activities. *Community for Creative Non-Violence* v. *Watt*, 216 U. S. App. D. C. 394, 670 F. 2d 1213 (1982) *(CCNV I)*. Those activities consisted of setting up and sleeping in nine tents in Lafayette Park. The regulations at issue in this case were promulgated in direct response to *CCNV I*. 47 Fed. Reg. 24299 (1982).

> stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. It is bordered by, *inter alia*, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country, as well as by large numbers of residents of the Washington metropolitan area." *Ante*, at 290.

Missing from the majority's description is any inkling that Lafayette Park and the Mall have served as the sites for some of the most rousing political demonstrations in the Nation's history. It is interesting to learn, I suppose, that Lafayette Park and the Mall were both part of Major Pierre L'Enfant's original plan for the Capital. Far more pertinent, however, is that these areas constitute, in the Government's words, "a fitting and powerful forum for political expression and political protest." Brief for Petitioners 11.[2]

The primary[3] purpose for making *sleep* an integral part of the demonstration was "to re-enact the central reality of homelessness," Brief for Respondents 2, and to impress upon public consciousness, in as dramatic a way as possible, that homelessness is a widespread problem, often ignored, that confronts its victims with life-threatening deprivations.[4] As one of the homeless men seeking to demonstrate explained: "Sleeping in Lafayette Park or on the Mall, for me, is to show people that conditions are so poor for the homeless and poor in this city that we would actually sleep *outside* in the winter to get the point across." *Id.*, at 3.

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[2] At oral argument, the Government informed the Court "that on any given day there will be an average of three or so demonstrations going on" in the Mall-Lafayette Park area. Tr. of Oral Arg. 3–4. Respondents accurately describe Lafayette Park "as the American analogue to 'Speaker's Corner' in Hyde Park." Brief for Respondents 16, n. 25.

[3] Another purpose for making sleep part of the demonstration was to enable participants to weather the rigors of the round-the-clock vigil and to encourage other homeless persons to participate in the demonstration. As respondents stated in their application for a demonstration permit:

> "If there was ever any question as to whether sleeping was a necessary element in this demonstration, it should be answered by now [in light of the previous year's demonstration]. No matter how hard we tried to get [homeless persons] to come to Reaganville [the name given to the demonstration by respondents], they simply would not come, until sleeping was permitted." App. 14.

In a long line of cases, this Court has afforded First Amendment protection to expressive conduct that qualifies as symbolic speech. See, *e. g.*, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969) (black armband worn by students in public school as protest against United States policy in Vietnam war); *Brown* v. *Louisiana*, 383 U. S. 131 (1966) (sit-in by Negro students in "whites only" library to protest segregation); *Stromberg* v. *California*, 283 U. S. 359 (1931) (flying red flag as gesture of support for communism). In light of the surrounding context, respondents' proposed activity meets the qualifications. The Court has previously acknowledged the importance of context in determining whether an act can properly be denominated as "speech" for First Amendment purposes and has provided guidance concerning the way in which courts should "read" a context in making this determination. The leading case is *Spence* v. *Washington*, 418 U. S. 405 (1974), where this Court held that displaying a United States flag with a peace symbol attached to it was conduct protected by the First Amendment. The Court looked first to the intent of the speaker—whether there was an "intent to convey a particularized message"—and second to the perception of the audience—whether "the likelihood was great that the message would be understood by those who viewed it." *Id.*, at 410–411. Here respondents clearly intended to protest the reality of homelessness by sleeping outdoors in the winter in the near vicinity of the magisterial residence of the President of the United States. In addition to accentuating the political character of their protest by their choice of location and mode of communication, respondents also intended to underline the meaning of their protest by giving their demonstration satirical names. Respondents planned to name the demonstration on the Mall "Congressional Village," and the demonstration in Lafayette Park, "Reaganville II." App. 13.

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[4] Estimates on the number of homeless persons in the United States range from two to three million. See Brief for National Coalition for the Homeless as *Amicus Curiae* 3. Though numerically significant, the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion. Moreover, homeless persons are likely to be denied access to the vote since the lack of a mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote. *Id.*, at 5.

The detrimental effects of homelessness are manifold and include psychic trauma, circulatory difficulties, infections that refuse to heal, lice infestations, and hypothermia. *Id.*, at 14–15. In the extreme, exposure to the elements can lead to death; over the 1983 Christmas weekend in New York City, 14 homeless persons perished from the cold. See N. Y. Times, Dec. 27, 1983, p. A1., col. 1.

Nor can there be any doubt that in the surrounding circumstances the likelihood was great that the political significance of sleeping in the parks would be understood by those who viewed it. Certainly the news media understood the significance of respondents' proposed activity; newspapers and magazines from around the Nation reported their previous sleep-in and their planned display.[5] Ordinary citizens, too, would likely understand the political message intended by respondents. This likelihood stems from the remarkably apt fit between the activity in which respondents seek to engage and the social problem they seek to highlight. By using sleep as an integral part of their mode of protest, respondents "can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match." *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 34, 703 F. 2d 586, 601 (1983) (Edwards, J. concurring).

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[5] See articles appended to Declaration of Mary Ellen Hombs, Record, Vol. 1.

It is true that we all go to sleep as part of our daily regimen and that, for the most part, sleep represents a physical necessity and not a vehicle for expression. But these characteristics need not prevent an activity that is normally devoid of expressive purpose from being used as a novel mode of communication. Sitting or standing in a library is a commonplace activity necessary to facilitate ends usually having nothing to do with making a statement. Moreover, sitting or standing is not conduct that an observer would normally construe as expressive conduct. However, for Negroes to stand or sit in a "whites only" library in Louisiana in 1965 was powerfully expressive; in that particular context, those acts became "monuments of protest" against segregation. *Brown* v. *Louisiana*, *supra*, at 139.

The Government contends that a forseeable difficulty of administration counsels against recognizing sleep as a mode of expression protected by the First Amendment. The predicament the Government envisions can be termed "the imposter problem": the problem of distinguishing bona fide protesters from imposters whose requests for permission to sleep in Lafayette Park or the Mall on First Amendment grounds would mask ulterior designs—the simple desire, for example, to avoid the expense of hotel lodgings. The Government maintains that such distinctions cannot be made without inquiring into the sincerity of demonstrators and that such an inquiry would itself pose dangers to First Amendment values because it would necessarily be content-sensitive. I find this argument unpersuasive. First, a variety of circumstances *already* require government agencies to engage in the delicate task of inquiring into the sincerity of claimants asserting First Amendment rights. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 215–216 (1972) (exception of members of religious group from compulsory education statute justified by group's adherence to deep religious conviction rather than subjective secular values); *Welsh* v. *United States*, 398 U. S. 333, 343–344 (1970) (eligibility for exemption from military service as conscientious objector status justified by sincere religious beliefs). It is thus incorrect to imply that any scrutiny of the asserted purpose of persons seeking a permit to display sleeping as a form of symbolic speech would import something altogether new and disturbing into our First Amendment jurisprudence. Second, the administrative difficulty the Government envisions is now nothing more than a vague apprehension. If permitting sleep to be used as a form of protected First Amendment activity actually created the administrative problems the Government now envisions, there would emerge a clear factual basis upon which to establish the necessity for the limitation the Government advocates.

The Government's final argument against granting respondents' proposed activity any degree of First Amendment protection is that the contextual analysis upon which respondents rely is fatally flawed by overinclusiveness. The Government contends that the *Spence* approach is overinclusive because it accords First Amendment status to a wide variety of acts that, although expressive, are obviously subject to prohibition. As the Government notes, "[a]ctions such as assassination of political figures and the bombing of government buildings can fairly be characterized as intended to convey a message that is readily perceived by the public." Brief for Petitioners 24, n. 18. The Government's argument would pose a difficult problem were the determination whether an act constitutes "speech" the end of First Amendment analysis. But such a determination is not the end. If an act is defined as speech, it must still be balanced against countervailing government interests. The balancing which the First Amendment requires would doom any argument seeking to protect antisocial acts such as assassination or destruction of government property from government interference because compelling interests would outweigh the expressive value of such conduct.

## II

Although sleep in the context of this case is symbolic speech protected by the First Amendment, it is nonetheless subject to reasonable time, place, and manner restrictions. I agree with the standard enunciated by the majority: "[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ante*, at 293 (citations omitted).[6] I conclude, however, that the regulations at issue in this case, as applied to respondents, fail to satisfy this standard.

According to the majority, the significant Government interest advanced by denying respondents' request to engage in sleep-speech is the interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Ante*, at 296. That interest is indeed significant. However, neither the Government nor the majority adequately explains how prohibiting respondents' planned activity will substantially further that interest.

The majority's attempted explanation begins with the curious statement that it seriously doubts that the First

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[6] I also agree with the majority that no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States* v. *O'Brien*, 391 U. S. 367 (1968). See *ante*, at 298–299, n. 8.

Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people. *Ante*, at 296. I cannot perceive why the Court should have "serious doubts" regarding this matter and it provides no explanation for its uncertainty. Furthermore, even if the majority's doubts were well founded, I cannot see how such doubts relate to the problem at hand. The issue posed by this case is not whether the Government is constitutionally compelled to permit the erection of tents and the staging of a continuous 24-hour vigil; rather, the issue is whether any substantial Government interest is served by banning sleep that is part of a political demonstration.

What the Court may be suggesting is that if the tents and the 24-hour vigil are permitted, but not constitutionally required to be permitted, then respondents have no constitutional right to engage in expressive conduct that supplements these activities. Put in arithmetical terms, the Court appears to contend that if X is permitted by grace rather than by constitutional compulsion, X + 1 can be denied without regard to the requirements the Government must normally satisfy in order to restrain protected activity. This notion, however, represents a misguided conception of the First Amendment. The First Amendment requires the Government to justify *every* instance of abridgment. That requirement stems from our oft-stated recognition that the First Amendment was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945), and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). See also *Buckley* v. *Valeo*, 424 U. S. 1, 49 (1976); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266 (1964); *Whitney* v. *California*, 274 U. S. 357, 375–378 (1927) (Brandeis, J., concurring). Moreover, the stringency of that requirement is not diminished simply because the activity the Government seeks to restrain is supplemental to other activity that the Government may have permitted out of grace but was not constitutionally compelled to allow. If the Government cannot adequately justify abridgment of protected expression, there is no reason why citizens should be prevented from exercising the *first* of the rights safeguarded by our Bill of Rights.

The majority's second argument is comprised of the suggestion that, although sleeping contains an element of expression, "its major value to [respondents'] demonstration would have been facilitative." *Ante*, at 296. While this observation does provide a hint of the weight the Court attached to respondents' First Amendment claims,[7] it is utterly irrelevant to whether the Government's ban on sleeping advances a substantial Government interest.

The majority's third argument is based upon two claims. The first is that the ban on sleeping relieves the Government of an administrative burden because, without the flat ban, the process of issuing and denying permits to other demonstrators asserting First Amendment rights to sleep in the parks "would present difficult problems for the Park Service." *Ante*, at 297. The second is that the ban on sleeping will increase the probability that "some around-the-clock demonstrations for days on end will not materialize, [that] others will be limited in size and duration, and that the purpose of the regulation will thus be materially served," *ante*, at 297, that purpose being "to limit the wear and tear on park properties." *Ante*, at 299.

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[7] The facilitative purpose of the sleep-in takes away nothing from its independent status as symbolic speech. Moreover, facilitative conduct that is closely related to expressive activity is itself protected by First Amendment considerations. I therefore find myself in agreement with Judge Ginsburg who noted that "the personal non-communicative aspect of sleeping in symbolic tents at a demonstration site bears a close, functional relationship to an activity that is commonly comprehended as 'free speech.'" *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 40, 703 F. 2d 586, 607 (1983). "[S]leeping in the tents rather than simply standing or sitting down in them, allows the demonstrator to sustain his or her protest without stopping short of the officially-granted round-the-clock permission." *Ibid.* For me, as for Judge Ginsburg, that linkage itself "suffices to require a genuine effort to balance the demonstrators' interests against other concerns for which the government bears responsibility." *Ibid.*

The flaw in these two contentions is that neither is supported by a factual showing that evinces a real, as opposed to a merely speculative, problem. The majority fails to offer any evidence indicating that the absence of an absolute ban on sleeping would present administrative problems to the Park Service that are substantially more difficult than those it ordinarily confronts. A mere apprehension of difficulties should not be enough to overcome the right to free expression. See *United States* v. *Grace*, 461 U. S. 171, 182 (1983); *Tinker* v. *Des Moines School Dist.*, 393 U. S., at 508. Moreover, if the Government's interest in avoiding administrative difficulties were truly "substantial," one would expect the agency most involved in administering the parks at least to allude to such an interest. Here, however, the perceived difficulty of administering requests from other demonstrators seeking to convey messages through sleeping was not among the reasons underlying the Park Service regulations.[8] Nor was it mentioned by the Park Service in its rejection of respondents' particular request.[9]

The Court's erroneous application of the standard for ascertaining a reasonable time, place, and manner restriction is also revealed by the majority's conclusion that a substantial governmental interest is served by the sleeping ban because it will discourage "around-the-clock demonstrations for days" and thus further the regulation's purpose "to limit wear and tear on park properties." *Ante*, at 299. The majority cites no evidence indicating that sleeping engaged in as symbolic speech will cause *substantial* wear and tear on park property. Furthermore, the Government's application of the sleeping ban in the circumstances of this case is strikingly underinclusive. The majority acknowledges that a proper time, place, and manner restriction must be "narrowly tailored." Here, however, the tailoring requirement is virtually forsaken inasmuch as the Government offers no justification for applying its absolute ban on sleeping yet is willing to allow respondents to engage in activities—such as feigned sleeping—that is no less burdensome.

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[8] See 47 Fed. Reg. 24301 (1982).

[9] App. 16–17.

In short, there are no substantial Government interests advanced by the Government's regulations as applied to respondents. All that the Court's decision advances are the prerogatives of a bureaucracy that over the years has shown an implacable hostility toward citizens' exercise of First Amendment rights.[10]

## III

The disposition of this case impels me to make two additional observations. First, in this case, as in some others involving time, place, and manner restrictions,[11] the Court has dramatically lowered its scrutiny of governmental regulations once it has determined that such regulations are content-neutral. The result has been the creation of a two-tiered approach to First Amendment cases: while regulations that turn on the content of the expression are subjected to a strict form of judicial review,[12] regulations that are aimed at matters other than expression receive only a minimal level of scrutiny. The minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection. By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity.[13] To be sure, the general prohibition against content-based regulations is an essential tool of First Amendment analysis. It helps to put into operation the well-established principle that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972). The Court, however, has transformed the ban against content distinctions from a floor that offers all persons at least equal liberty under the First Amendment into a ceiling that restricts persons to the protection of First Amendment equality—but nothing more.[14] The consistent imposition of silence upon all may fulfill the dictates of an evenhanded content-neutrality. But it offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.[15]

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[10] At oral argument, the Government suggested that the ban on sleeping should not be invalidated as applied to respondents simply because the Government is willing to allow respondents to engage in other nonverbal acts of expression that may also trench upon the Government interests served by the ban. Tr. of Oral Arg. 15, 23. The Government maintains that such a result makes the Government a victim of its own generosity. However the Government's characterization of itself as an unstinting provider of opportunities for protected expression is thoroughly discredited by a long line of decisions *compelling* the National Park Service to allow the expressive conduct it now claims to permit as a matter of grace. See, *e. g.*, *Women Strike for Peace* v. *Morton*, 153 U. S. App. D. C. 198, 472 F. 2d 1273 (1972); *A Quaker Action Group* v. *Morton*, 170 U. S. App. D. C. 124, 516 F. 2d 717 (1975); *United States* v. *Abney*, 175 U. S. App. D. C. 247, 534 F. 2d 984 (1976).

[11] See, *e. g.*, *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981). But see *United States* v. *Grace*, 461 U. S. 171 (1983); *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *Brown* v. *Louisiana*, 383 U. S. 131 (1966).

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[12] See, *e. g., Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978). It should be noted, however, that there is a context in which regulations that are facially content-neutral are nonetheless subjected to strict scrutiny. This situation arises when a regulation vests standardless discretion in officials empowered to dispense permits for the use of public forums. See, *e. g., Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Hague* v. *CIO*, 307 U. S. 496 (1939); *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969).

[13] See Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981).

[14] Furthermore, a content-neutral regulation does not necessarily fall with random or equal force upon different groups or different points of

Second, the disposition of this case reveals a mistaken assumption regarding the motives and behavior of Government officials who create and administer content-neutral regulations. The Court's salutary skepticism of governmental decisionmaking in First Amendment matters suddenly dissipates once it determines that a restriction is not

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view. A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse. See, *e. g.*, *City Council of Los Angeles* v. *Taxpayers for Vincent*, *supra*, at, 812–813, n. 30. This sort of latent inequality is very much in evidence in this case for respondents lack the financial means necessary to buy access to more conventional modes of persuasion.

A disquieting feature about the disposition of this case is that it lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas. In the past, this Court has taken such considerations into account in adjudicating the First Amendment rights of those among us who are financially deprived. See, *e. g.*, *Martin* v. *Struthers*, 319 U. S. 141, 146 (1943) (striking down ban on door-to-door distribution of circulars in part because this mode of distribution is "essential to the poorly financed causes of little people"); *Marsh* v. *Alabama*, 326 U. S. 501 (1946) (State cannot impose criminal sanction on person for distributing literature on sidewalk of town owned by private corporation). Such solicitude is noticeably absent from the majority's opinion, continuing a trend that has not escaped the attention of commentators. See, *e. g.*, Dorsen & Gora, Free Speech, Property, and The Burger Court: Old Values, New Balances, 1982 S. Ct. Rev. 195; Van Alstyne, The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court, 43 Law & Contemp. Prob. 66 (summer 1980).

[15] For a critique of the limits of the equality principle in First Amendment analysis see Redish, *supra*, at 134–139.

content-based. The Court evidently assumes that the balance struck by officials is deserving of deference so long as it does not appear to be tainted by content discrimination. What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must accommodate—on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity—the political power of the former is likely to be far greater than that of the latter.[16]

The political dynamics likely to lead officials to a disproportionate sensitivity to regulatory as opposed to First Amendment interests can be discerned in the background of this case. Although the Park Service appears to have applied the revised regulations consistently, there are facts in the record of this case that raise a substantial possibility that the impetus behind the revision may have derived less from concerns about administrative difficulties and wear and tear on the park facilities, than from other, more "political," concerns. The alleged need for more restrictive regulations stemmed from a court decision favoring the same First Amendment claimants that are parties to this case. See n. 1, *supra.* Moreover, in response both to the Park Service's announcement that it was considering changing its rules and the respondents' expressive activities, at least one powerful group urged the Service to tighten its regulations.[17] The point of these observations is not to impugn the integrity of the National Park Service. Rather, my intention is to illustrate concretely that government agencies by their very nature are driven to overregulate public forums to the detriment of First Amendment rights, that facial viewpoint-neutrality is no shield against unnecessary restrictions on unpopular ideas or modes of expression, and that in this case in particular there was evidence readily available that should have impelled the Court to subject the Government's restrictive policy to something more than minimal scrutiny.

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[16] See Goldberger, Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials, 32 Buffalo L. Rev. 175, 208 (1983).

[17] See Declaration of Mary Ellen Hombs, Exhibit 1kk, Record, Vol. 1.

For the foregoing reasons, I respectfully dissent.

# RICHARDSON *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2113. Argued March 20, 1984—Decided June 29, 1984

Petitioner was indicted on three counts of federal narcotics violations. At his trial, the jury acquitted him on one count but was unable to agree on the others. The District Court declared a mistrial as to the remaining counts and scheduled a retrial. Petitioner then moved to bar a retrial, claiming that it would violate the Double Jeopardy Clause of the Fifth Amendment. The District Court denied the motion, and the Court of Appeals dismissed petitioner's appeal from that ruling for lack of jurisdiction under 28 U. S. C. § 1291.

*Held:*

1. Petitioner raised a colorable double jeopardy claim appealable under 28 U. S. C. § 1291. While consideration of this claim would require the Court of Appeals to canvas the sufficiency of the evidence at the first trial, this fact alone does not prevent the District Court's order denying the claim from being appealable. Pp. 320-322.

2. On the merits, however, regardless of the sufficiency of the evidence at his first trial, petitioner has no valid double jeopardy claim. The protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, that terminates the original jeopardy. Neither the failure of the jury to reach a verdict nor a trial court's declaration of a mistrial following a hung jury is an event that terminates the original jeopardy. Like the defendant, the Government is entitled to resolution of the case by the jury. Pp. 322-326.

226 U. S. App. D. C. 342, 702 F. 2d 1079, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 326. STEVENS, J., filed a dissenting opinion, *post*, p. 332.

*Allan M. Palmer* argued the cause and filed briefs for petitioner.

*Michael W. McConnell* argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor*

*General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Kathleen A. Felton.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The jury trying petitioner acquitted him of one of several counts, but was unable to agree as to the others. The District Court declared a mistrial as to these counts of the indictment and set them down for retrial. Petitioner moved to bar his retrial, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the Government at the first trial. The District Court denied this motion, and the Court of Appeals dismissed petitioner's appeal from that ruling for lack of jurisdiction under 28 U. S. C. § 1291. We now reverse that jurisdictional determination and proceed to address the merits of petitioner's double jeopardy claim. We find the claim unavailing, since it lacks its necessary predicate, there having been no termination of original jeopardy.

Petitioner was indicted in the United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 21 U. S. C. § 841(a)(1), and one count of conspiring to distribute a controlled substance, in violation of 21 U. S. C. § 846. Twice—at the close of the Government's case in chief and before submission of the case to the jury—he moved unsuccessfully for judgment of acquittal on the ground that the Government had failed to introduce sufficient evidence to warrant a finding of guilt beyond a reasonable doubt.[1] The jury acquitted petitioner of one substantive narcotics violation, but was unable to reach a verdict on the two remaining counts. The District Court declared a mistrial as to these two remaining counts and scheduled a retrial, at which point petitioner renewed his motion for judgment of acquittal based on the legal insufficiency of the evidence. In addition, petitioner argued at this time that retrial was barred by the Double Jeopardy Clause of the Fifth Amendment.[2] The District Court denied both motions and petitioner appealed.

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[1] The substance of petitioner's claim that the Government's evidence was insufficient to convict is that the evidence established that petitioner was involved in only one drug transaction, an event which alone, he argues, is insufficient to support a charge of conspiracy. Alternatively, petitioner argues that even if the evidence supports a finding that two drug sales took place, these sales were so isolated in time that no conspiracy could be inferred from their occurrence. Petitioner's case depends, however,

The Court of Appeals for the District of Columbia Circuit dismissed petitioner's appeal for want of jurisdiction. 226 U. S. App. D. C. 342, 702 F. 2d 1079 (1983). The Court of Appeals reasoned that its jurisdiction to review petitioner's double jeopardy claim depended upon the appealability of the District Court's ruling on petitioner's motion for judgment of acquittal based on the insufficiency of the evidence. Because the District Court's ruling on the latter motion was not a final judgment appealable under 28 U. S. C. § 1291, that ruling could only be reviewed if it fell within the collateral-order doctrine enunciated by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). The court held that the ruling on the legal sufficiency of the evidence was "anything but collateral," and thus it lacked appellate jurisdiction to review that claim. 226 U. S. App. D. C., at 344–345, 702 F. 2d, at 1081–1082. Since the merits of petitioner's double jeopardy claim depended entirely on reviewing the legal sufficiency of the evidence, the court concluded that petitioner had failed to present a double jeopardy claim

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on excluding from consideration all statements made by his alleged co-conspirator implicating petitioner in the drug scheme. In light of our holding that petitioner has no valid double jeopardy claim, we have no occasion to address this argument.

[2] The text of the Double Jeopardy Clause of the Fifth Amendment reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

which could be reviewed at that point.[3] We granted certiorari to review the decision of the Court of Appeals, 464 U. S. 890 (1983), because of a conflict with the decision reached by the Third Circuit in *United States* v. *McQuilkin*, 673 F. 2d 681 (1982),[4] and because of the implications of the decision below for the administration of criminal justice.

Petitioner contends that under our decisions in *Abney* v. *United States*, 431 U. S. 651 (1977), and *Burks* v. *United States*, 437 U. S. 1 (1978), he is entitled to an interlocutory review of his claim that a second trial is barred by the Double Jeopardy Clause because the Government failed to introduce legally sufficient evidence to go to the jury at the first trial. *Burks*, however, involved no issue of interlocutory review, since it was an appeal from a final judgment of conviction. But *Abney* arose in the context of an interlocutory appeal. There we held that denial of a defendant's pretrial motion to dismiss an indictment on double jeopardy grounds was appealable as a "collateral order" under 28 U. S. C. § 1291. Despite the strong congressional policy embodied in § 1291 against interlocutory appeals in criminal cases, *DiBella* v. *United States*, 369 U. S. 121, 126 (1962), we held that the claim in *Abney* met the three-part test established in *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, because a double jeopardy claim contested the very power of the Government to bring a person to trial, and the right would be significantly impaired if review were deferred until after the trial. We said:

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[3] Judge Scalia dissented, arguing that under our decision in *Abney* v. *United States*, 431 U. S. 651 (1977), the court had jurisdiction under 28 U. S. C. § 1291 to review petitioner's double jeopardy claim. Judge Scalia would have held, however, that petitioner failed to raise a meritorious double jeopardy claim.

[4] Two other Circuits that have considered the question have reached the same conclusion as the Court of Appeals in this case. See *United States* v. *Ellis*, 646 F. 2d 132, 135 (CA4 1981); *United States* v. *Becton*, 632 F. 2d 1294, 1297 (CA5 1980), cert. denied, 454 U. S. 837 (1981).

> "Obviously, [this] aspec[t] of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." 431 U. S., at 662 (footnote omitted) (emphasis in original).

The Government contends, and the Court of Appeals agreed, that the double jeopardy claim raised by petitioner in this case does not meet the three-part test of the *Cohen* case. It argues that resolution of the double jeopardy claim inevitably involves evaluation of the sufficiency of the evidence against petitioner at the first trial, and therefore the claim is not completely collateral to the merits of the charge against petitioner. Cf. *Abney*, *supra*, at 660. To dispose of petitioner's double jeopardy claim, the reviewing court would have to conclude that the evidence introduced at the first trial on these counts was insufficient as a matter of law to convict petitioner. This canvassing of the record would be indistinguishable from an assessment of the sufficiency of the evidence that would be reviewed after a judgment of conviction, and, of course, would go to the heart of the Government's case on the merits. The Government and the Court of Appeals, therefore, are of the view that petitioner's double jeopardy claim may be only reviewed following a final judgment of conviction after a second trial.

All of this may be conceded, and yet we think that the collateral-order doctrine applied in *Abney* should not be read so narrowly as to bar from interlocutory review the type of double jeopardy claim asserted here. Petitioner seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy. While consideration of petitioner's double jeopardy claim would require the appellate court to canvass the sufficiency of the evidence at the first trial, this fact alone does not prevent the District Court's order denying petitioner's double jeopardy claim from being appealable.

The Government understandably expresses concern that interlocutory appeals of this nature may disrupt the administration of criminal justice. But allowing appeals such as this is completely consistent with the Court's admonition in *Cohen* that the words "final decision" in § 1291 should have a "practical rather than a technical construction." *Cohen*, 337 U. S., at 546. Petitioner's first trial had ended and his second trial had been rescheduled before he asserted his double jeopardy claim to bar retrial. There was thus no effort to interrupt or delay proceedings during the time that a jury was empaneled or that the District Court had under advisement motions relating to the first trial. Moreover, we have indicated that the appealability of a double jeopardy claim depends upon its being at least "colorable," *United States* v. *MacDonald*, 435 U. S. 850, 862 (1978), and that "frivolous claims of former jeopardy" may be weeded out by summary procedures, *Abney*, *supra*, at 662, n. 8. Cf. *United States* v. *Head*, 697 F. 2d 1200, 1204 (CA4 1982). These limitations, together with the continuing requirement that the order of the District Court which is appealed from be a "final" decision on the double jeopardy claim, provide adequate insurance against the evils which the Government fears. Thus, we hold that petitioner has raised a colorable double jeopardy claim appealable under 28 U. S. C § 1291.

Turning to the merits of petitioner's double jeopardy claim, we reject it. He asserts that if the Government failed to introduce sufficient evidence to establish his guilt beyond a reasonable doubt at his first trial, he may not be tried again following a declaration of a mistrial because of a hung jury. While petitioner bases this contention on *Burks* v. *United States*, 437 U. S. 1 (1978), we do not agree that *Burks* resulted in the sweeping change in the law of double jeopardy which petitioner would have us hold. In *Burks* we held that once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause. *Id.*, at 18. We overruled prior decisions such as *Bryan* v. *United States*, 338 U. S. 552 (1950), in which we held that if a defendant successfully sought reversal of his conviction on appeal because of insufficient evidence, retrial following such reversal was not barred by the Double Jeopardy Clause.

The Court in *Burks* did not deal with the situation in which a trial court declares a mistrial because of a jury's inability to agree on a verdict. Thus, petitioner's reliance on *Burks* in the context of the present case can be supported only if that decision laid down some overriding principle of double jeopardy law that was applicable across the board in situations totally different from the facts out of which it arose. But it is quite clear that our decision in *Burks* did not extend beyond the procedural setting in which it arose. Where, as here, there has been only a mistrial resulting from a hung jury, *Burks* simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 308–310 (1984).

The case law dealing with the application of the prohibition against placing a defendant twice in jeopardy following a mistrial because of a hung jury has its own sources and logic. It has been established for 160 years, since the opinion of Justice Story in *United States* v. *Perez*, 9 Wheat. 579 (1824), that a failure of the jury to agree on a verdict was an instance of "manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant, because "the ends of public justice would otherwise be defeated." *Id.*, at 580. Since that time we have had occasion to examine the application of double jeopardy principles to mistrials granted for reasons other than the inability of the jury to agree, whether the mistrial is granted on the motion of the prosecution, see *Illinois* v. *Somerville*, 410 U. S. 458 (1973), or on the motion of the defendant, see *Oregon* v. *Kennedy*, 456 U. S. 667 (1982); *United States* v. *Dinitz*, 424 U. S. 600 (1976). Nevertheless, we have constantly adhered to the rule that a retrial following a "hung jury" does not violate the Double Jeopardy Clause. *Logan* v. *United States*, 144 U. S. 263, 297–298 (1892). Explaining our reasons for this conclusion in *Arizona* v. *Washington*, 434 U. S. 497 (1978), we said:

> "[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Id.*, at 509.

We are entirely unwilling to uproot this settled line of cases by extending the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict following a jury verdict of guilty, to a situation where the jury is unable to agree on a verdict. Thirty-five years ago we said in *Wade* v. *Hunter*, 336 U. S. 684, 688–689 (1949):

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a

> jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."

We think that the principles governing our decision in *Burks*, and the principles governing our decisions in the hung jury cases, are readily reconciled when we recognize that the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. See *Justices of Boston Municipal Court, supra; Price* v. *Georgia*, 398 U. S. 323, 329 (1970). Since jeopardy attached here when the jury was sworn, see *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569 (1977), petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy.

But this proposition is irreconcilable with cases such as *Perez* and *Logan*, and we hold on the authority of these cases that the failure of the jury to reach a verdict is not an event which terminates jeopardy. Our holding in *Burks* established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal; it obviously did not establish, consistently with cases such as *Perez*, that a hung jury is the equivalent of an acquittal.[5] Justice Holmes' aphorism that "a page of history is worth a volume of logic" sensibly applies here, and we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.[6]

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[5] Of course, a trial court's finding of insufficient evidence also is the equivalent of an acquittal, see *Hudson* v. *Louisiana*, 450 U. S. 40, 44–45, n. 5 (1981), but *Burks* was not necessary to establish that principle. See *Burks* v. *United States*, 437 U. S., at 11, citing *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Kepner* v. *United States*, 195 U. S. 100 (1904).

Accordingly, we reverse the judgment of the Court of Appeals on the question of jurisdiction, and on the merits conclude that the District Court was correct in denying petitioner's motion to bar retrial.

*It is so ordered.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

Petitioner was indicted and tried on two counts of distributing a controlled substance. He claims that the prosecution failed to present constitutionally sufficient evidence to sustain its case. The jury, perhaps due to the alleged inadequacy of the evidence, was unable to reach a verdict and was therefore dismissed. As a result of today's decision, petitioner will be tried again on the same indictment before a new jury, notwithstanding the fact that, as we must assume, he was entitled to acquittal as a matter of law. It seems to me quite clear that he will thereby "be subject for the same offence to be twice put in jeopardy for life or limb." U. S. Const., Amdt. 5. Yet the Court declares that, despite appearances, petitioner's trial did not really end with the dismissal of the jury and that therefore his imminent retrial is not really a new trial at all. In my judgment, common sense and the Double Jeopardy Clause are not so incompatible.

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[6] It follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer "colorable" double jeopardy claims which may be appealed before final judgment. A colorable claim, of course, presupposes that there is some possible validity to a claim. Cf. *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983); *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 694–695 (1982). Since no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can begin.

I agree with the Court that petitioner's claim is appealable under 28 U. S. C. § 1291 and that the case therefore turns on whether, if petitioner's sufficiency-of-the-evidence claim is valid, retrial is barred. Relying on cases in which we have held that "retrial following a 'hung jury' does not violate the Double Jeopardy Clause," *ante*, at 324, the Court asserts that "the failure of the jury to reach a verdict is not an event which terminates jeopardy," *ante*, at 325. In so reasoning, the Court, in my view, improperly ignores the realities of the defendant's situation and relies instead on a formalistic concept of "continuing jeopardy." See *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 315–316 (1984) (BRENNAN, J., concurring in part and concurring in judgment). Apparently, under the Court's approach, only an actual judgment of acquittal, or an unreversed conviction, would "terminate" jeopardy and thereby bar retrial. Accordingly, a defendant who is constitutionally *entitled to an acquittal* but who fails to receive one—because he happens to be tried before an irrational or lawless factfinder or because his jury cannot agree on a verdict—is worse off than a defendant tried before a factfinder who demands constitutionally sufficient evidence. Indeed, he is worse off than a *guilty* defendant who is acquitted due to mistakes of fact or law. See *Arizona* v. *Rumsey*, 467 U. S. 203, 211 (1984). I do not believe this paradoxical result is faithful to the principle we have repeatedly reaffirmed that the Double Jeopardy Clause "precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so." *Hudson* v. *Louisiana*, 450 U. S. 40, 45, n. 5 (1981). See *Justices of Boston Municipal Court* v. *Lydon*, *supra*, at 314.

Instead, as I explained at greater length in *Lydon*, I believe a common-sense approach to claims of "continuing jeopardy" requires a court to ask, first, whether an initial proceeding at which jeopardy attached has now objectively ended, and, second, whether a new proceeding would violate the Constitution. 466 U. S., at 320–322. In answering the first question, we should look to the fundamental policies of the Double Jeopardy Clause, "namely, its concern that repeated trials may subject a defendant 'to embarrassment, expense and ordeal and compe[l] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' . . . Jeopardy may be said to have terminated only when the posture of a trial in some objective sense leaves the defendant in such a position that resumption of proceedings would implicate those policies." *Id.*, at 320 (quoting *Green* v. *United States*, 355 U. S. 184, 187–188 (1957)). Employing that analysis, I have little trouble concluding that when a jury, unable to reach a verdict, is dismissed and a mistrial is declared, a defendant's trial has come to an end. An entirely new trial on the same indictment before a new jury, presumably with much of the same evidence, will plainly subject the defendant to the kinds of risks and costs that the Double Jeopardy Clause was intended to prohibit. See *Arizona* v. *Washington*, 434 U. S. 497, 503–504 (1978).[1] I therefore conclude that the declaration of a mistrial "terminated" one proceeding against petitioner.[2]

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[1] In contrast to a defendant tried in a two-tier system like that at issue in *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294 (1984), a defendant in petitioner's circumstances will approach his trial on the assumption that it will be his only opportunity to influence the factfinder in his favor. That expectation will result in a maximum dedication of the defendant's resources to the initial proceeding, will deprive him of the ability to take strategic advantage of his knowledge that he will have another factfinding opportunity, and will engender in him a significant degree of anxiety during the course of the first trial. Accordingly, in a traditional

In so concluding, I do not reject the longstanding rule, emphasized by the Court, that, in cases of "manifest necessity," retrial may be permitted despite a mistrial. "The fact that a trial has ended does not . . . complete the constitutional inquiry; the Court has concluded [in several contexts] that strong policy reasons may justify subjecting a defendant to two trials in certain circumstances notwithstanding the literal language of the Double Jeopardy Clause." *Lydon*, 466 U. S., at 308–309. Until the decision in *Lydon*, however, we did not seek to justify such a retrial by pretending that it was not really a new trial at all but was instead simply a "continuation" of the original proceeding. See *ibid.* In *Arizona* v. *Washington*, *supra*, for example, we reviewed the unusual

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trial system, an event that ends the first proceeding, such as the declaration of a mistrial, has significance in terms of the policies underlying the Double Jeopardy Clause that it does not have in the two-tier context. Cf. *Lydon*, *supra*, at 320–321 (BRENNAN, J., concurring in part and concurring in judgment).

[2] By identifying the point at which a trial has terminated, I believe we also determine the point at which a defendant should be able to obtain review of a claim that a new trial is barred. See *Justices of Boston Municipal Court* v. *Lydon*, *supra*, at 320–321 (BRENNAN, J., concurring in part and concurring in judgment). Such a claim is plainly ripe when the first proceeding has ended and a new one is imminent. As the Court explains, a "colorable" double jeopardy claim "contest[s] the very power of the Government to bring a person to trial, and the right would be significantly impaired if review were deferred until after the trial." *Ante*, at 320. See *Abney* v. *United States*, 431 U. S. 651, 662 (1977).

Indeed, the Court's conclusion in this regard makes its holding on the merits that much more bewildering. In the context of discussing the jurisdictional question, the Court states that "[p]etitioner's first trial had ended and his second trial had been rescheduled before he asserted his double jeopardy claim to bar retrial." *Ante*, at 322. Cf. *post*, at 335–337 (STEVENS, J., dissenting). Yet, on the merits, it rules "that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected." *Ante*, at 326. Apparently, the proceedings petitioner will experience constitute two trials for jurisdictional purposes but only one trial for double jeopardy purposes.

circumstances that might permit retrial after a mistrial order. We did not, however, seek to evade the commonsense fact that such an order "terminates" the first trial. We explained that, "[u]nlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is *terminated* without finally resolving the merits of the charges against the accused." 434 U. S., at 505 (emphasis added). In short, the question whether a trial has ended is distinct from the question whether a new trial is permissible.

In answering the second question, I believe the mistrial cases on which the Court relies so heavily are quite beside the point. It is, of course, true, as the Court explains, that we have long held "'that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial.'" *Ante*, at 324 (quoting *Arizona* v. *Washington*, *supra*, at 509). But that proposition demonstrates only that petitioner's new trial is not constitutionally barred simply because the original jury was unable to reach a verdict. Petitioner's objection to the new trial is not, however, based on the fact that his trial ended with a hung jury. Instead, he contends that retrial is prohibited because the prosecution failed to present constitutionally sufficient evidence at the trial. That contention is, in my view, correct under *Burks* v. *United States*, 437 U. S. 1, 15–16 (1978), notwithstanding the fact that, in contrast to the situation in that case, no court has yet declared the evidence insufficient. The fundamental principle underlying *Burks*, and indeed most of our double jeopardy cases, is that the prosecution is entitled to one, and only one, full and fair opportunity to convict the defendant. When the prosecution has failed to present constitutionally sufficient evidence, it cannot complain of unfairness in being denied a second chance, and the interests in finality, shared by the defendant and society, strongly outweigh the reasons for a retrial. See *ibid.;* see also *Arizona* v. *Washington*, *supra*, at 503–504. These principles are no less applicable in a case in which the inadequacy of the evidence is not recognized by the trial judge.

Indeed, in *Tibbs* v. *Florida*, 457 U. S. 31 (1982), we explained that, unless a defendant can obtain review of a sufficiency claim prior to retrial, the protections established in *Burks* and its successors would become illusory. In that case, the Court held that state appellate reversal of a conviction as against the weight of the evidence does not bar retrial under *Burks*. In response to the fear expressed by the dissent that state appellate courts could mask reversals for insufficiency by characterizing them as based on the weight of the evidence, the Court explained:

> "We held in *Jackson* [v. *Virginia*, 443 U. S. 307 (1979),] that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt. The Due Process Clause, in other words, sets a lower limit on an appellate court's definition of evidentiary sufficiency. This limit, together with our belief that state appellate judges faithfully honor their obligations to enforce applicable state and federal laws, persuades us that today's ruling will not undermine *Burks*." 457 U. S., at 45 (footnote omitted).

The reasoning of *Tibbs* necessarily presupposes that the Double Jeopardy Clause bars retrial after the prosecution's failure of proof at the first trial—even if that failure of proof is as yet judicially undeclared. If this were not so, the "masking" problem discussed in *Tibbs* would be irrelevant: the state appellate court could remand for retrial without addressing the insufficiency claim and the defendant would never be able to challenge the evidence at the first trial. See also *id.*, at 51 (WHITE, J., dissenting).

In sum, I believe that when a jury has been dismissed because of its inability to reach a verdict, the defendant's trial has ended, in law as in common sense. A defendant who contends that the evidence at that trial was constitutionally insufficient, and that he was therefore entitled to a judgment of acquittal as a matter of law, plainly has a "colorable" claim that a second trial would violate the Double Jeopardy Clause and the trial judge's denial of the claim is therefore immediately appealable. And, finally, if the reviewing court decides the evidence was in fact inadequate, I believe further proceedings against the defendant for the same offense are barred under the rule in *Burks*. I would therefore remand the case for consideration of petitioner's sufficiency claim on the merits.

JUSTICE STEVENS, dissenting.

The dispositive question of appellate jurisdiction that is presented in this case is whether an order denying a motion for a judgment of acquittal on the ground that the evidence is legally insufficient is appealable as a final judgment.[1] I believe that the order is not appealable; therefore, as a matter of law, not even a colorable double jeopardy question is presented.

## I

After the District Court had discharged the jury because it was unable to agree upon a verdict on two counts of the indictment, petitioner filed two separate motions: (1) a motion for a judgment of acquittal on the ground that the evidence was legally insufficient to support a conviction; and (2) a motion to bar retrial on the ground that because he was "entitled to judgments of acquittal on those counts," a second trial would violate the Double Jeopardy Clause. App. 15a. On Friday, September 11, 1981, the District Court entered a written order denying the first motion. *Id.*, at 18a. Petitioner promptly filed a notice of appeal in which he described that order as having "denied motions for judgments of acquittal and by necessary implication double jeop. claim." Record 28. On Monday, September 13, 1981, in a colloquy with petitioner's counsel, the District Court agreed that "the double jeopardy claim [that] hinged on the ruling [on the motion for] Judgment of Acquittal" had been denied implicitly.[2]

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[1] The Government states the question presented as follows:

"Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at that trial reviewed on appeal before the commencement of the second trial." Brief for United States I.

Two separate questions of appellate jurisdiction were therefore presented to the Court of Appeals. Judge Wilkey's opinion for the Court of Appeals correctly recognized the separate character of the two questions and correctly answered them both. First, if we separately consider the order denying the motion for a judgment of acquittal, it is perfectly clear that, because the District Court did not reach a final judgment, the motion is not appealable on its face as a "final decision," 28 U. S. C. § 1291, or under the "collateral order" exception to the final-judgment rule established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).[3]

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[2] "Mr. Palmer: Yes, Your Honor. Just as a housekeeping matter, the double jeopardy claim, of course, hinged on the ruling of Judgment of Acquittal.

"Having denied the Judgment of Acquittal a fortiori, I assume that you also denied the double jeopardy claim.

"The Court: No question about it.

"Mr. Palmer: So, just as a matter of record, can it also be indicated that, on September 11th, you also sought and did deny the double jeopardy claim also?

"The Court: Yes." App. 20a.

[3] As Judge Wilkey explained:

"To come within the reach of the *Cohen* exception, the decision in question must meet three tests. First, it must fully dispose of the controverted issue; in no sense may it 'leave the matter "open, unfinished or inconclusive."' Second, it must not be 'simply a "step toward final disposition of the merits of the case"'; it must resolve 'an issue completely collateral to the cause of action asserted.' Finally, the decision must involve 'an important right which would be "lost, probably irreparably,"' if review awaited final judgment.

"We have little difficulty in applying this test to the district court's ruling on Richardson's insufficiency claim. That ruling fails to meet the second

Second, it is equally clear that unless petitioner was entitled to have his first motion granted, there was no basis in law for his dependent double jeopardy motion. Indeed, as petitioner recognized in his notice of appeal and in his colloquy with the District Court, the double jeopardy argument is entirely contingent on the validity of his first motion—the second "hinged" on the first; the denial of the first implicitly rejected the second. Because the order denying the principal motion is not appealable, it is difficult for me to understand how the Court can conclude that the order implicitly denying the dependent motion can either be appealable in its own right, or can convert the otherwise nonappealable, nonfinal order into an appealable order.

Plainly there can be no substance or "color" to a double jeopardy claim that does not identify some order terminating

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and third requirements of *Cohen*. As two other circuits have noted, the legal sufficiency of the evidence presented is 'a completely non-collateral issue.' This is because the ultimate question in a criminal trial is whether the defendant is guilty of the crime charged. A defendant who chooses to go to trial is not guilty unless the prosecution is able to prove beyond a reasonable doubt that the defendant committed the crime. If the evidence presented at the first trial was legally insufficient, Richardson is automatically not guilty. Thus, the sufficiency of the evidence is anything but collateral to the merits of the upcoming trial (*i. e.*, the question of defendant's guilt, for this is *determined by* the sufficiency of the evidence); rather, it is a 'step toward final disposition of the merits of the case [which will] be merged in the final judgment,' the type of issue which is *not* covered by the collateral order exception.

"Further, the right to appellate review of the issue will not necessarily be lost if we refuse review at this time. Three circuits have held that a criminal defendant can challenge the sufficiency of the evidence presented at his first trial (which resulted in a hung jury) when appealing his conviction at the second trial. Indeed, in the present case the government concedes that Richardson's insufficiency claim will not be lost if it is not reviewed at this time, noting that 'in the event he is convicted, [Richardson] can raise [the insufficiency claim] on appeal from that conviction.' Therefore, because the insufficiency claim does not meet either the second or third *Cohen* requirements, we cannot review that claim until after a final judgment is entered." 226 U. S. App. D. C. 342, 344, 702 F. 2d 1079, 1081 (1983) (footnotes omitted).

a first jeopardy as constituting a bar to a second trial. As long as the claim rested entirely on an asserted "entitlement" to such an order, the claim can be no stronger than the right to that order. If petitioner had obtained a favorable ruling on his motion for acquittal, a second trial would, of course, be barred. Without that ruling, however, there is not even an arguable basis for a double jeopardy claim.

## II

The Court states that "petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy." *Ante*, at 325. That is not the way I read the record. Rather, petitioner argues that because the evidence was insufficient, he was "entitled" to have his jeopardy terminated by an order granting his motion for a judgment of acquittal. Until such an order was entered, in view of the fact that he did not argue that the mistrial order itself constituted a termination of jeopardy, his jeopardy would continue.

The appealability issue would be different *if* the petitioner were claiming that the order declaring a mistrial was itself a bar to a second trial. If, for example, the jury had deliberated for only a few minutes and the prosecutor, fearful of an adverse verdict, had persuaded the trial judge to discharge the jury before it could fairly be said that they were deadlocked—in other words, when there was no "manifest necessity," see *Arizona* v. *Washington*, 434 U. S. 497, 505–508 (1978)—the defendant might then argue that the mistrial order was itself tantamount to an acquittal that terminated the first jeopardy. This is not, however, such a case because petitioner does not challenge the order declaring a mistrial and he has no other order to which he can point as constituting a bar to a second trial.

## III

Although I recognize the precedential authority of *Abney* v. *United States*, 431 U. S. 651 (1977), I do not believe that case acts as a vacuum cleaner of appealability for every claim couched as a double jeopardy violation. In *Abney*, the Court carefully noted that "it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review," *id.*, at 659, but that such orders fell within the *Cohen* collateral-order exception to the final-judgment rule. 431 U. S., at 659. To begin with, I have already noted that the denial of a motion for a judgment of acquittal based on insufficient evidence cannot separately survive the *Cohen* analysis. More important, I believe that the Court's discussion of *Cohen*'s collateral-issue prong in *Abney* supports the view that *Abney* was not intended to reach a situation such as that before us today. The Court stated:

> "Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. The elements of that claim are completely independent of his guilt or innocence. . . . Thus, the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not 'affect, or . . . be affected by, decision of the merits of this case.'" 431 U. S., at 659–660 (quoting *Cohen*, 337 U. S., at 546) (citations omitted).

Although the Court began with a broad general reference to "a double jeopardy claim," its specific discussion of the particular double jeopardy claim involved highlights differences between it and the one here. Here, the petitioner *is* challenging the merits of the charge against him; the elements of his insufficient-evidence claim *are not* completely independent of his guilt or innocence; the matters embraced within the trial court's order *will* affect the decision of the merits of the case. Thus, although broadly written, *Abney* is not broad enough to support the conclusion "that petitioner has raised a colorable double jeopardy claim appealable under 28 U. S. C. § 1291." *Ante*, at 322.

Because the essence of petitioner's claim is that he should be relieved of any additional jeopardy as soon as he is entitled to the entry of a judgment of acquittal, there is no more reason to allow immediate appellate review in this case than in one in which the defendant tried to appeal from an order denying a motion for judgment of acquittal at the close of the prosecution's case. As I recently noted in a similar context, the availability of premature review would give defendants "every incentive . . . not only to delay eventual punishment, but to obtain leverage in plea negotiations." *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 334–335 (1984). Moreover, "[t]he speed and efficiency of the process would quickly be eroded if [interlocutory appeals] intervened between the first and second trials." *Ibid.* "[U]ndue litigiousness and leaden-footed administration of justice [is] particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U. S. 121, 124 (1962); see also *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940). Further, while it is true that the postponement of appellate review, see n. 3, *supra*, will cause some hardship because defendants will have to proceed through second trials before having their claims reviewed, as Judge Wilkey correctly observed,[4] that hardship is far less grievous than the Court's conclusion that such claims may never be reviewed. See *ante*, at 323, 326.

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[4] 226 U. S. App. D. C., at 346–347, and n. 30, 702 F. 2d, at 1083–1084, and n. 30.

In sum, I would affirm the judgment of the Court of Appeals. It correctly held that the order denying the motion for judgment of acquittal was not appealable. Because petitioner's entire appeal constituted an attack on that order, it was properly dismissed. Accordingly, I respectfully dissent.

# HOBBY *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82–2140. Argued April 25, 1984—Decided July 2, 1984

Petitioner, a white male, was indicted on federal fraud charges. Prior to trial, he moved for dismissal of the indictment on the ground that there was discrimination in the grand jury selection process in violation of the Due Process Clause of the Fifth Amendment. At a hearing on the motion to dismiss, petitioner introduced testimony of a statistical social science consultant showing that for a 7-year period prior to petitioner's indictment none of the 15 grand juries empaneled had had a Negro or female foreman and that of the 15 deputy foremen appointed only 3 had been Negroes and 6 had been women. The District Court denied the motion to dismiss, and petitioner was convicted after a jury trial. The Court of Appeals affirmed.

*Held:* Assuming that discrimination entered into the selection of grand jury foremen, such discrimination does not warrant reversal of petitioner's conviction and dismissal of the indictment against him. Pp. 342–350.

(a) Discrimination in the selection of grand jury foremen—as distinguished from discrimination in the selection of the grand jury itself—does not in any sense threaten the interests of a defendant protected by the Due Process Clause. Unlike the grand jury itself, the office of grand jury foreman is not a creature of the Constitution, but, instead, was originally instituted by statute for the convenience of the court. The responsibilities of a federal grand jury foreman are essentially clerical in nature—administering oaths, maintaining records, and signing indictments. Given its ministerial nature, the role of foreman is not so significant to the administration of justice that discrimination in the selection of the foreman has any appreciable effect on the defendant's due process right to fundamental fairness. And so long as the composition of a federal grand jury *as a whole* serves the defendant's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives, discrimination in the selection of the foreman does not impinge such interest. Pp. 342–346.

(b) An assumption that discrimination in the selection of a grand jury foreman requires the setting aside of a conviction is not warranted here where a white male is challenging on due process grounds the selection of the foreman of a federal grand jury. *Rose* v. *Mitchell*, 443 U. S. 545, distinguished. Pp. 346–349.

(c) This Court declines petitioner's invitation to embark, pursuant to its supervisory power over the federal courts, upon a course of vacating convictions because of discrimination in the selection of grand jury foremen. Pp. 349–350.

702 F. 2d 466, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 350. STEVENS, J., filed a dissenting opinion, *post*, p. 362.

*Daniel H. Pollitt* argued the cause and filed briefs for petitioner.

*Joshua I. Schwartz* argued the cause for the United States. With him on the brief were *Solicitor General Lee, Assistant Attorney General Trott,* and *Deputy Solicitor General Wallace.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of Negroes and women in that position, requires reversal of the conviction of a white male defendant and dismissal of the indictment against him.

## I

Petitioner, a white male, was indicted on one count of conspiring to defraud the United States of funds appropriated under the Comprehensive Employment and Training Act of 1973, 29 U. S. C. §801 *et seq.* (CETA), in violation of 18 U. S. C. §§371 and 665, and three counts of fraudulently ob-

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *William Van Alstyne, Sara Sun Beale, Burt Neuborne,* and *Charles S. Sims;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Jack Greenberg, James M. Nabrit III,* and *Charles Stephen Ralston.*

taining and misapplying CETA grant funds, in violation of 18 U. S. C. § 665. Prior to trial in the United States District Court for the Eastern District of North Carolina, petitioner moved for dismissal of the indictment against him "due to improper selection of grand jurors." App. 32. In particular, he alleged that the grand jury selection plan "exclude[d] citizens from service . . . on account of race, color, economic status and occupation, in violation of . . . the Fifth and Sixth Amendments of the United States Constitution." *Id.*, at 33.

At an evidentiary hearing on the motion to dismiss, petitioner introduced the testimony of a statistical social science consultant regarding the characteristics of the persons selected as grand jury foremen or deputy foremen in the Eastern District of North Carolina between 1974 and 1981. The expert witness reported that none of the 15 grand juries empaneled during this 7-year period had had a Negro or female foreman. Of the 15 deputies appointed during this interval, so this expert testified, 3 had been Negroes and 6 had been women. From these data the expert witness concluded that Negroes and women were underrepresented among grand jury foremen and deputy foremen serving in the Eastern District of North Carolina. Rejecting petitioner's claim of discrimination in the selection process, the District Court denied petitioner's motion to dismiss the indictment, and petitioner was convicted after a jury trial.

The United States Court of Appeals for the Fourth Circuit affirmed. 702 F. 2d 466 (1983). Reasoning that the foreman of a federal grand jury performs a strictly ministerial function, the Court of Appeals viewed the foreman's impact upon the justice system and the rights of criminal defendants as minimal and incidental at most. In response to petitioner's contention that appointment as foreman may enlarge an individual's capacity to influence the other grand jurors, the Court of Appeals concluded that this likelihood was too vague and speculative to warrant dismissals of indictments and reversals of convictions.

The Court of Appeals recognized that in *Rose* v. *Mitchell*, 443 U. S. 545, 551–552, n. 4 (1979), this Court assumed without deciding that discrimination in the selection of the foreman of a *state* grand jury would require that a subsequent conviction be set aside. The Court of Appeals noted, however, that the function of the grand jury foreman in the federal system differs substantially from the role of the grand jury foreman in the states. The court concluded that the rights of defendants are fully protected by assuring that the composition of the federal grand jury as a whole is not the product of discriminatory selection.

We granted certiorari to resolve a conflict among the Circuits on this issue,[1] 464 U. S. 1017 (1983), and we affirm.

## II

### A

It is well settled, of course, that purposeful discrimination against Negroes or women in the selection of federal grand jury foremen is forbidden by the Fifth Amendment to the Constitution. The question presented here, however, is the narrow one of the appropriate remedy for such a violation. It is only the narrow question of the remedy that we consider. No factual evidence was presented to the District Court on the issue of discrimination; instead, petitioner relied upon inferences to be drawn from the failure to select a woman or Negro as foreman of the grand jury for the seven years studied. As did the Court of Appeals, we proceed on the assumption that discrimination occurred in order to treat the constitutional issue presented by the motion to dismiss.

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[1] Compare *United States* v. *Aimone*, 715 F. 2d 822 (CA3 1983) (discrimination in federal grand jury foreman selection does not raise constitutional concerns); 702 F. 2d 466 (CA4 1983) (case below) (same); *United States* v. *Coletta*, 682 F. 2d 820 (CA9 1982) (alleged discrimination in federal grand jury foreman selection insufficient to imply due process violation), cert. denied, 459 U. S. 1202 (1983), with *United States* v. *Cross*, 708 F. 2d 631 (CA11 1983) (position of federal grand jury foreman constitutionally significant); *United States* v. *Perez-Hernandez*, 672 F. 2d 1380 (CA11 1982) (discrimination in selection of federal grand jury foreman may require reversal of conviction; defendant failed to establish such discrimination). See also *United States* v. *Cronn*, 717 F. 2d 164 (CA5 1983) (white male defendant lacks standing to press equal protection challenge to discrimination in selection of federal grand jury foreman; constitutional significance of foreman not addressed).

Invoking the Due Process Clause of the Fifth Amendment, petitioner argues that discrimination in the selection of grand jury foremen requires the reversal of his conviction and dismissal of the indictment against him. In *Peters* v. *Kiff*, 407 U. S. 493 (1972), the opinion announcing the judgment discussed the due process concerns implicated by racial discrimination in the composition of grand and petit juries as a whole. Emphasizing the defendant's due process right to be fairly tried by a competent and impartial tribunal, see *In re Murchison*, 349 U. S. 133, 136 (1955), the opinion reasoned that unconstitutionally discriminatory jury selection procedures create the appearance of institutional bias, because they "cast doubt on the integrity of the whole judicial process." 407 U. S., at 502. Moreover, the opinion perceived an important societal value in assuring diversity of representation on grand and petit juries:

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Id.*, at 503–504 (footnote omitted).[2]

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[2] *Peters* held that a white male had standing to bring a racial-discrimination challenge to the system used to select his grand and petit juries. JUSTICE MARSHALL, in an opinion joined by Justices Douglas and Stewart, reasoned that the defendant had standing to assert a denial of due process of law. 407 U. S., at 504. JUSTICE WHITE, in an opinion joined by JUS-

Discrimination in the selection of grand jury foremen—as distinguished from discrimination in the selection of the grand jury itself—does not in any sense threaten the interests of the defendant protected by the Due Process Clause. Unlike the grand jury itself, the office of grand jury foreman is not a creature of the Constitution; instead, the post of foreman was originally instituted by statute for the convenience of the court. See 28 U. S. C. § 420 (1934 ed.); Rev. Stat. § 809 (1878). Today, authority for the appointment of a grand jury foreman is found in Federal Rule of Criminal Procedure 6(c), which provides:

> "The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman."

Rule 6(c) has somewhat ancient roots, cast as it is in what are now obsolete terms: foreman and deputy foreman. Centuries of usage, relating back to a day when women did not serve on juries, have embedded such terms in the law as in our daily vocabulary. However, it is not for us to amend the Rule outside the processes fixed by Congress for rulemaking; that is a task for the appropriate committees and the Judicial Conference of the United States.

As Rule 6(c) illustrates, the responsibilities of a federal grand jury foreman are essentially clerical in nature: adminis-

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TICES BRENNAN and POWELL, concluded that standing would implement the strong statutory policy of 18 U. S. C. § 243, which provides that no qualified citizen "shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude. . . ." *Id.*, at 505–507.

tering oaths, maintaining records, and signing indictments. The secrecy imperative in grand jury proceedings demands that someone "mind the store," just as a secretary or clerk would keep records of other sorts of proceedings. But the ministerial trappings of the post carry with them no special powers or duties that meaningfully affect the rights of persons that the grand jury charges with a crime, beyond those possessed by every member of that body. The foreman has no authority apart from that of the grand jury as a whole to act in a manner that determines or influences whether an individual is to be prosecuted. Even the foreman's duty to sign the indictment is a formality, for the absence of the foreman's signature is a mere technical irregularity that is not necessarily fatal to the indictment. *Frisbie* v. *United States*, 157 U. S. 160, 163–165 (1895).

As the Court of Appeals noted, the impact of a federal grand jury foreman upon the criminal justice system and the rights of persons charged with crime is "minimal and incidental at best." 702 F. 2d, at 471. Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.

Nor does discrimination in the appointment of grand jury foremen impair the defendant's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives. The due process concern that no "large and identifiable segment of the community [be] excluded from jury service," *Peters* v. *Kiff*, 407 U. S., at 503, does not arise when the alleged discrimination pertains only to the selection of a foreman from among the members of a properly constituted federal grand jury. That the grand jury in this case was so properly constituted is not questioned. No one person can possibly represent all the "qualities of human nature and varieties of human experience," *ibid.*, that may be present in a given community. So long as the composition of the federal grand jury *as a whole* serves the representational due process values expressed in *Peters*, discrimination in the appointment of one member of the grand jury to serve as its foreman does not conflict with those interests.

The ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause. Absent an infringement of the fundamental right to fairness that violates due process, there is no basis upon which to reverse petitioner's conviction or dismiss the indictment.

### B

Petitioner argues that the Court's decision in *Rose* v. *Mitchell*, 443 U. S. 545 (1979), supports his position that discrimination in the selection of federal grand jury foremen warrants the reversal of his conviction and dismissal of the indictment against him. In *Rose*, two Negro defendants brought an equal protection challenge to the selection of grand jury foremen in Tennessee. The Court rejected the view that claims of grand jury discrimination should be considered harmless error when raised by a defendant who had been convicted by a properly constituted petit jury at an error-free trial on the merits, and adhered to the position that discrimination in the selection of the grand jury was a valid ground for setting aside a criminal conviction. *Id.*, at 551–559. The Court then assumed "*without deciding* that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire." *Id.*, at 551–552, n. 4 (emphasis added). The Court concluded, however, that the defendants were not entitled to have their convictions set aside because they had failed to make out a prima facie case of discrimination in violation of the Equal Protection Clause with regard to the selection of grand jury foremen. *Id.*, at 564–574.

Petitioner's reliance upon *Rose* is misplaced. *Rose* involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class allegedly excluded from service as grand jury foremen, the *Rose* defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries. See, *e. g.*, *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). Petitioner, however, has alleged only that the exclusion of women and Negroes from the position of grand jury foreman violates his right to fundamental fairness under the Due Process Clause. As we have noted, discrimination in the selection of federal grand jury foremen cannot be said to have a significant impact upon the due process interests of criminal defendants. Thus, the nature of petitioner's alleged injury and the constitutional basis of his claim distinguish his circumstances from those of the defendants in *Rose*.

Moreover, *Rose* must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible population at large. The foreman then served as "'the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof.'" *Rose*

v. *Mitchell*, *supra*, at 548, n. 2 (quoting Tenn. Code Ann. § 40–1506 (Supp. 1978)). The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed. Rule Crim. Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.

Finally, the role of the Tennessee grand jury foreman differs substantially from that of the foreman in the federal system. The Tennessee foreman had the following duties:

> "He or she is charged with the duty of assisting the district attorney in investigating crime, may order the issuance of subpoenas for witnesses before the grand jury, may administer oaths to grand jury witnesses, must endorse every bill returned by the grand jury, and must present any indictment to the court in the presence of the grand jury. . . . The absence of the foreman's endorsement makes an indictment 'fatally defective.' *Bird* v. *State*, 103 Tenn. 343, 344, 52 S. W. 1076 (1899)." *Rose* v. *Mitchell*, *supra*, at 548, n. 2.

The investigative and administrative powers and responsibilities conferred upon the grand jury foreman in Tennessee, who possessed virtual veto power over the indictment process, stand in sharp contrast to the ministerial powers of the federal counterpart, who performs strictly clerical tasks and whose signature on an indictment is a mere formality.

*Frisbie* v. *United States*, 157 U. S. 160 (1895); see *supra*, at 344–345.

Given the nature of the constitutional injury alleged in *Rose*, the peculiar manner in which the Tennessee grand jury selection operated, and the authority granted to the one who served as foreman, the Court assumed in *Rose* that discrimination with regard to the foreman's selection would require the setting aside of a subsequent conviction, "just as if the discrimination proved had tainted the selection of the entire grand jury venire." *Rose* v. *Mitchell*, 443 U. S., at 551–552, n. 4. No such assumption is appropriate here, however, in the very different context of a due process challenge by a white male to the selection of foremen of federal grand juries.

## III

At oral argument, petitioner eschewed primary reliance upon any particular constitutional provision and instead invoked this Court's supervisory power over the federal courts as a basis for the relief he seeks. Tr. of Oral Arg. 4–5, 7, 13–14. Only by setting aside his conviction and dismissing the indictment against him, petitioner urges, will this Court deter future purposeful exclusion of minorities and women from the post of federal grand jury foreman. It is true that this Court's "supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb* v. *United States*, 318 U. S. 332, 340 (1943). See *United States* v. *Hasting*, 461 U. S. 499 (1983). However, we decline petitioner's invitation to embark upon the course of vacating criminal convictions because of discrimination in the selection of foremen. Less Draconian measures will suffice to rectify the problem.

In no sense do we countenance a purposeful exclusion of minorities or women from appointment as foremen of federal grand juries. We are fully satisfied that the district judges charged with the appointment of grand jury foremen will see to it that no citizen is excluded from consideration for service in that position on account of race, color, religion, sex, national origin, or economic status. Cf. 28 U. S. C. § 1862.

## IV

We hold that, assuming discrimination entered into the selection of federal grand jury foremen, such discrimination does not warrant the reversal of the conviction of, and dismissal of the indictment against, a white male bringing a claim under the Due Process Clause. Accordingly, the judgment of the United States Court of Appeals for the Fourth Circuit is

*Affirmed.*

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The majority assumes that a judge of the United States District Court for the Eastern District of North Carolina purposefully discriminated against Negroes and women in selecting the foreman of the grand jury that indicted petitioner. The majority recognizes that such discrimination is unconstitutional. The Court concludes, however, that dismissal of petitioner's indictment is unwarranted because "the impact of a federal grand jury foreman upon the criminal justice system and the rights of persons charged with crime is 'minimal and incidental at best,'" *ante*, at 345 (citation omitted), thereby rendering the relief petitioner requests incommensurate with the injury he received. I dissent because the Court errs in its assessment of (I) the dimensions of the injury to the criminal justice system caused by discrimination in the selection of grand jury foremen, (II) the dimensions of the injury to an individual defendant, and (III) the relative social costs that would likely be imposed by dismissing petitioner's indictment compared to the costs that are likely to be exacted by the Court's resolution of this case.

## I

An established principle of this Court's jurisprudence is that the injury caused by race and sex discrimination in the formation of grand and petit juries is measured not only in terms of the actual prejudice caused to individual defendants but also in terms of the injury done to public confidence in the integrity of the judicial process. For example, in *Peters* v. *Kiff*, 407 U. S. 493 (1972), this Court reversed a Court of Appeals that had denied federal habeas corpus relief to a white defendant convicted in state court who had challenged his indictment on the ground that Negroes had been excluded from his grand jury. The State argued that, absent a showing of actual bias, the convicted defendant was not entitled to dismissal of his indictment. Three Justices, in the opinion announcing the judgment, rejected this argument on the ground that it took "too narrow a view of the kinds of harm that flow from discrimination" in grand jury selection. *Id.*, at 498. They declared that dismissal of the indictment was required because "[i]llegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." *Id.*, at 502–503.

This theme was reaffirmed in *Rose* v. *Mitchell*, 443 U. S. 545 (1979). In *Rose*, we held that two state prisoners who sought federal habeas corpus relief had failed to present a prima facie case that the foreman of the grand jury that indicted them had been selected in a discriminatory manner. We strongly suggested, however, that proven discrimination would support the dismissal of an indictment. The Court again rebuffed the view that dismissal of an indictment was unwarranted. Instead, the Court reiterated its longstanding belief that dismissal was required regardless of the actual harm inflicted upon any particular defendant because "larger concerns," *id.*, at 555, were implicated:

> "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the ap-

> pearance of justice and thereby casts doubt on the integrity of the judicial process . . . . [S]uch discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' . . . 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *Id.*, at 555–556 (citation omitted).[1]

There is good reason why public confidence in the integrity of the judiciary is diminished whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal justice serve purposes independent of accurate factfinding. These institutions also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms.[2] They reflect what we demand of ourselves as a Nation committed to fairness and equality in the enforcement of the law. That is why discrimination "is especially pernicious in the administration of justice," why its effects constitute an injury "to the law as an institution," why its presence must be eradicated root and branch by the most effective means available.

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[1] Cf. *Ballard* v. *United States*, 329 U. S. 187 (1946): "[E]xclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection." *Id.*, at 195.

[2] "In a government of laws, existence of the government will be imperilled if it fails to observe the laws scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

The majority argues that the constitutional violation that assumably occurred does not warrant dismissal of petitioner's indictment because the functions performed by a federal grand jury foreman are so incidental that discriminatory selection with respect to that post poses no substantial threat that petitioner was actually prejudiced *or* that the judicial process will be impugned in the mind of the public. The majority observes that, in contrast to *Peters* v. *Kiff, supra,* petitioner alleges only that Negroes and women were improperly excluded from the post of grand jury foreman and not that they were excluded from the grand jury as a whole. It posits that the observant public will realize that the tainted selection practice is simply too unimportant to justify an overall loss of confidence in the proceedings inasmuch as the foreman was chosen from an unobjectionable venire, has no more voting power than any other grand juror, and performs tasks that are merely ministerial.

The vice of this argument is that by focusing exclusively upon the role of the grand jury foreman it disregards the true dimensions of the violation. After all, the foreman was not the perpetrator of the constitutional violation. The persons assumed to have purposefully excluded Negroes and women from consideration for the foreman position were judges of the United States District Court. A judge is supposed to be the very embodiment of evenhanded justice. Society reveals its confidence that a judge will attend to his official duties without illicit regard for race or sex or other irrelevant characteristics by entrusting to him wide discretionary authority. The idea that a person occupying such a powerful and sensitive position would discriminate on the basis of race and sex in selecting grand jury foremen is extraordinarily disquieting and will be so to the public. For it is unlikely that a judge who engages in racist and sexist appointment practices will confine his prejudicial attitudes and actions to the area of foreman selections. More likely is that the presence of unconstitutional discrimination in that area is but a portion of a widespread region of tainted decisionmaking.

Furthermore, by allocating authority within the grand jury venire on the basis of race and sex, the judge who assumably discriminated against Negroes and women helped to perpetuate well-known and vicious stereotypes that our society has been struggling to erase. To denigrate the significance of the judge's violation by characterizing its effect as "minimal and incidental" exposes the judiciary to justified charges of hypocrisy.

## II

With respect to the issue whether petitioner himself was harmed by the violation, the majority concludes that discrimination in the selection of a grand jury foreman "can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness." *Ante*, at 345. To justify this conclusion the Court first attempts to distinguish this case from *Peters* v. *Kiff*, 407 U. S. 493 (1972), where the defendant challenged the selection of the grand jury as a whole. In the Court's view, "[d]iscrimination in the selection of grand jury foremen—as distinguished from discrimination in the selection of the grand jury itself—does not in any sense threaten the interests of the defendant protected by the Due Process Clause." *Ante*, at 344. To buttress this distinction, the majority observes that "[u]nlike the grand jury itself, the office of grand jury foreman is not a creature of the Constitution" but was "originally instituted by statute for the convenience of the court." *Ibid.* This observation is useful, I suppose, as a revelation of antiquarian fact; however, it is utterly unconvincing as an explanation of why we must presume, as a matter of law, that discrimination in the selection of grand jury foremen can have no appreciable effect upon a defendant's right to fair proceedings. Neither the United States district courts nor the United States courts of appeals are creatures of the

Constitution; both were established pursuant to statute.[3] I assume, however, that their legislative as opposed to constitutional origins does not attenuate their crucial importance in the federal judicial scheme.

Another factor the majority focuses upon as a way of distinguishing *Peters* v. *Kiff*, *supra*, from the case at hand is that in *Peters* the exclusion of Negroes from the grand jury venire had impaired the defendant's interest in "assuring that the grand jury includes persons with a range of experiences and perspectives." *Ante*, at 345. By contrast, in this case, the discrimination did not affect the composition of the grand jury but rather its internal organization: the process by which a foreman was selected. The majority contends that the discrimination flowing from that process does not implicate the concerns raised by *Peters* because no one person can possibly represent the variety of backgrounds and perspectives found in a given community. *Ante*, at 346. This contention should be rejected because it mistakenly applies the principle for which *Peters* stands. *Peters* stands for the proposition that a defendant is entitled to have his case screened by a grand jury venire from which no segment of the community has been improperly excluded. What that principle means, in the context of this case, is that petitioner was entitled to a foreman selection process from which neither Negroes nor women were excluded merely on the basis of their race or their sex. While petitioner was not entitled to a Negro or woman foreman, he was entitled to at least the possibility of having a woman or Negro foreman. That possibility was nullified by the purposeful discrimination that presumably occurred in this case.

To establish that the influence exerted by a federal foreman's position is "minimal and incidental" the Court looks principally to Rule 6(c) of the Federal Rules of Criminal Procedure. The trouble with the Court's approach is that, by concentrating on the formal responsibilities of a foreman as delineated by Rule 6(c), it ignores powers and duties of the foreman that have developed "by custom, practice, and necessity." *United States* v. *Cross*, 708 F. 2d 631, 637–638 (CA11 1983).[4] A realistic understanding of the actual function performed by federal grand jury foremen must be supplemented by additional sources of evidence. One such source is the Handbook for Federal Grand Jurors (1980) (Handbook), prepared by the Judicial Conference Committee on the Operation of the Jury System. The Handbook "was recommended by the Judicial Conference for use in the United States District Courts to orient and prepare newly impaneled grand jurors." *Id.*, at 3. Its mission was to explain to grand jurors "clearly and simply" their obligations and duties. *Ibid.* The Handbook informs grand jurors that the court will appoint one of them to be "the foreman, or presiding officer, of the grand jury," *id.*, at 9; that if an emergency prevents attendance at a meeting, the affected grand juror "must promptly advise the grand jury foreperson, who has the authority to excuse" a grand juror's absence, *id.*, at 25; that the foreman administers the oath to witnesses before the grand jury, *id.*, at 11; that the foreman initiates the juror's questioning of witnesses, *id.*, at 26; that the foreman determines whether an interpreter is required, *id.*, at 11;

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[3] See U. S. Const., Art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

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[4] Even if I limited my analysis to the information provided by Rule 6(c), I would still maintain that the foreman's job is sufficiently consequential that discrimination in the means of selecting someone to perform it could actually prejudice a defendant. The very designation by the judge that one person will serve as foreman importantly differentiates that person from the other members of the venire. See *United States* v. *Cross*, 708 F. 2d, at 637 ("A foreperson has only one vote on the grand jury, but the selection by the district judge might appear to the other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers").

that the foreman initiates deliberations, tallies the votes, and reports the grand jury's conclusions to the court, *id.*, at 13.

The description of the foreman's role provided by the Handbook is more detailed than that offered by Rule 6(c) and more attuned to what is expected of the foreman in his day-to-day responsibility for presiding over the grand jury. This description portrays a post that is far more than merely clerical in nature; rather, it portrays a post that enables, indeed requires, a person to be first among equals within the grand jury room.

The Handbook's description is corroborated by the testimony of District Court Judges who have testified under oath as to the qualities they look for in selecting a grand jury foreman. See *United States* v. *Breland*, 522 F. Supp. 468, 471–474 (ND Ga.); *United States* v. *Manbeck*, 514 F. Supp. 141, 150 (SC 1981); *United States* v. *Northside Realty Associates, Inc.*, 510 F. Supp. 668, 683–684 (ND Ga. 1981); *United States* v. *Holman*, 510 F. Supp. 1175 (ND Fla. 1981); *United States* v. *Jenison*, 485 F. Supp. 655, 665–666 (SD Fla. 1979). Two patterns emerge from such testimony. First, district judges typically allocate considerable time and attention to the selection of grand jury foremen.[5] If the foreman's post is as insignificant as the majority contends, there would be little reason for district judges to be as concerned as they are with finding persons with the requisite qualities that make for a good foreman. Second, District Judges have testified that they typically select as foremen those who have "good management skills, strong occupational experience, the ability to preside, good educational background, and personal leadership qualities." *United States* v. *Cross*, *supra*, at 636 (summarizing testimony adduced in *United States* v. *Holman*, *supra*, and *United States* v. *Jenison*, *supra*).[6] Were the post merely clerical in nature, there would be little reason for judges to seek out persons with "personal *leadership* qualities."[7]

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[5] For example, in *United States* v. *Breland*, the court indicated that one District Judge had testified that, before selecting a foreman he "considered each [grand juror] questionnaire, making several tentative choices before reaching a final decision." 522 F. Supp., at 473. The court indicated that another District Judge "reviewed every juror questionnaire . . . then observed prospective grand jurors in the courtroom as they were identified and answered the roll call . . . ." *Ibid.*

There is, moreover, another consideration that the majority fails to address: the peculiar difficulty of detecting the harm caused by racist and sexist practices in the administration of criminal justice. We recognized in *Peters* v. *Kiff*, that it is in the nature of discriminatory selection processes "that proof of actual harm, or lack of harm, is virtually impossible to adduce . . . ." 407 U. S., at 504. In *Peters*, where the issue arose in the context of deciding whether to allow a white person to challenge discriminatory practices excluding Negroes, the opinion announcing the judgment stated that the consequences of uncertainty should fall upon the prosecution. That opinion therefore concluded that "[i]n light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few." *Ibid.* Likewise, in light of the potential for harm latent in the unconstitutional selection of a grand jury foreman by a district court judge, and a defendant's (and society's) strong interest in avoiding that harm, any doubt should be resolved in favor of applying standards that are too stringent rather than too lax.

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[6] For example, in *United States* v. *Holman*, a District Judge testified that the foreperson should possess sufficient intellectual independence to prevent being "easily led by the United States Attorney." 510 F. Supp., at 1180. Similarly, in *United States* v. *Jenison*, a District Judge testified that he chose foremen on the basis of "work history" and "leadership ability." 485 F. Supp., at 665.

[7] The Court also maintains that an indicium of the purported insignificance of the foreman's position is that the absence of his signature on an indictment is deemed a mere technical irregularity that does not invalidate the indictment. *Ante*, at 344–345. This observation reveals nothing of significance about the functional importance of the foreman's position. The refusal to invalidate an indictment merely because it lacks the signature of the foreman simply reflects a practical recognition that important government objectives, otherwise justified on the basis of applicable law, should not be stymied on the basis of meaningless formalities. See, *e. g.*, *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965) (rejecting challenge to adequacy of search warrant affidavit because such documents must be "tested and interpreted . . . in a commonsense and realistic fashion").

## III

The consequence of the Court's misperception of the nature and dimensions of the constitutional violation that is assumed to have occurred is a misunderstanding of what constitutes an appropriate remedy. The majority declines "to embark upon the course of vacating criminal convictions because of discrimination in the selection of [grand jury] foremen" because "[l]ess Draconian measures will suffice to rectify the problem." *Ante,* at 349. Yet the Court never articulates what "less Draconian" measures it has in mind. It states that it is "fully satisfied that the district judges charged with the appointment of grand jury foremen will see to it that no citizen is excluded from consideration for service in that position on account of race, color, religion, sex, national origin, or economic status." *Ante,* at 349–350. Such assurance, however, is completely nonsensical since, in this case, the Court must assume that a District Judge did exclude persons on the basis of race and sex.

Determining the appropriateness of reversing petitioner's indictment requires applying the elementary, though oft-ignored, principle that every right must be vindicated by an effective remedy.[8] For "'[i]f constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation.'" *United States* v. *Calandra*, 414 U. S. 338 (1974) (BRENNAN, J., dissenting, joined by MARSHALL, J.) (quoting Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970)). It would be intolerable if the constitutional prohibition against discrimination in the selection of grand jury foremen could be violated without practical consequence. The traditional remedy for unconstitutional government action is that which petitioner requests: nullification. Nullification is especially appropriate here where there is an absence of any other remedy that is even remotely effective.

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[8] See *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right").

The Court declares by fiat that dismissing petitioner's indictment would constitute a "Draconian" measure. Missing from the Court's opinion, however, is any indication that the Court considered factors essential to determining the proper scope of a remedy. The inchoate nature of the majority's reasoning is especially regrettable since the Court engaged in a comprehensive explication of an appropriate balancing analysis in *Rose* v. *Mitchell*, 443 U. S., at 553–559.

In *Rose*, the Court reaffirmed its rejection of the view that the social costs of dismissing an indictment outweigh the costs imposed by a less effective remedy. It recognized that there are substantial costs imposed by dismissing an indictment following conviction—*i. e.*, the costs attendant to retrying a defendant. It determined, however, that those costs were "outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice." *Id.*, at 558. In making that determination, the Court took into account two considerations. First, the Court looked to the types of remedies courts resort to in rectifying and deterring analogous constitutional violations. The Court observed that dismissal of an indictment is in many ways less drastic than remedies resorted to in other contexts where constitutional rights have been violated. *Id.*, at 557–558. In the case of an illegal search or a coerced confession, the violation often results in the suppression of evidence that is highly probative on the issue of guilt. Dismissing an indictment, however, does not render a defendant practically immune from subsequent reindictment and reprosecution. In the subsequent reprosecution, the Government remains free to use the proof it initially introduced to obtain the conviction in the first instance. Second, the Court looked to the efficacy of alternative remedies. It recognized that there exists a criminal statute prohibiting discriminatory selection practices with respect to grand juries and that such illicit practices are also actionable in civil suits. The Court noted, however, that the inadequacies[9] of these alternative remedies disabled them from assuming alone the burden of discouraging purposeful discrimination in the selection of grand jury foremen. A similar calculus would yield a similar result in this case.

## IV

There is no doubt that this Court has the legitimate authority to order relief that would effectively deter federal judges from purposefully discriminating against Negroes and women in the selection of grand jury foremen. It has done so in similar contexts by ordering the dismissal of indictments against defendants convicted in both federal and state courts, and it has done so to vindicate both federal constitutional rights and its own supervisory authority over the proper administration of justice within the federal judiciary.[10]

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[9] The Court noted that 18 U. S. C. § 243 makes it a federal crime to exclude citizens from service on grand and petit juries on account of race. It recognized, however, that prosecutions under § 243 have been rare and that they "are not under the control of the class members and the courts." 443 U. S., at 558. The Court further recognized that "[c]ivil actions, expensive to maintain and lengthy, have not often been used." *Ibid.*

[10] In *Ballard* v. *United States*, 329 U. S. 187 (1946), the Court dismissed an indictment against a convicted defendant on the ground that women had

The discriminatory conduct at issue resides within the four corners of the federal judicial process, an area uniquely amenable to this Court's influence. And the constitutional principles and federal policies violated by this conduct are among the most definite, basic and deeply rooted in all of our jurisprudence.[11] I therefore find the opinion of the Court both misguided and mysterious. If the Court is serious when it declares that it can "[i]n no sense . . . countenance" race and sex-based discrimination in the selection of federal grand jury foremen, *ante*, at 349, then it surely subverts its own declaration by both refusing to grant the long-established remedy petitioner requests and declining to offer even a glimpse of effective alternative remedies. I respectfully dissent.

JUSTICE STEVENS, dissenting.

A rule that forbids discrimination in the selection of a grand jury must be justified primarily by the overriding interest in maintaining the integrity of the judicial process—both the actual fairness of that process and the symbolic values that it embodies. As I understand the Court's prior cases, it is settled that the process that leads to a State's deprivation of a person's liberty is not "due process" if the selection of the grand jury that indicted the defendant was tainted by racial prejudice. That principle applies to the grand jury foreman, for he performs a function that has both practical and symbolic significance. See *Rose* v. *Mitchell*, 443 U. S. 545 (1979). Although I have expressed my doubts

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been systematically excluded from his grand jury even though, at that time, Congress had not expressly prohibited disqualification of federal jurors on account of sex. Legislation now expressly provides that "[n]o citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status." 28 U. S. C. § 1862.

[11] See, *e. g.*, *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Smith* v. *Texas*, 311 U. S. 128 (1940). See also 18 U. S. C. § 243; 28 U. S. C. § 1862.

concerning the wisdom of applying this principle in certain situations, see *id.*, at 593–594 (STEVENS, J., dissenting in part), if we enforce the principle in state proceedings, surely we must insist on adherence to the same standard in the federal judicial system. Accordingly, I join JUSTICE MARSHALL's dissenting opinion.

# FEDERAL COMMUNICATIONS COMMISSION *v.* LEAGUE OF WOMEN VOTERS OF CALIFORNIA ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 82-912. Argued January 16, 1984—Decided July 2, 1984

The Public Broadcasting Act of 1967 (Act) established the Corporation for Public Broadcasting (CPB), a nonprofit corporation, to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of the Act forbids any noncommercial educational station that receives a grant from the CPB to "engage in editorializing." Appellees (Pacifica Foundation, a nonprofit corporation that owns and operates several noncommercial educational broadcasting stations that receive grants from the CPB, the League of Women Voters of California, and an individual listener and viewer of public broadcasting) brought an action in Federal District Court challenging the constitutionality of § 399. The District Court granted summary judgment in appellees' favor, holding that § 399 violates the First Amendment.

*Held:* Section 399's ban on editorializing violates the First Amendment. Pp. 374–402.

(a) Congress, acting pursuant to the Commerce Clause, has power to regulate the use of the broadcast medium. In the exercise of this power, Congress may seek to assure that the public receives through this medium a balanced presentation of information and views on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of the owners and operators of broadcasting stations. At the same time, since broadcasters are engaged in a vital and independent form of communicative activity, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power. Thus, although the broadcasting industry operates under restrictions not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. As a result, the absolute freedom to advocate one's own positions without also presenting opposing viewpoints—a freedom enjoyed, for example, by newspaper publishers—is denied to broadcasters. Such restrictions have been upheld by this Court only when they were narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues. Pp. 374–381.

(b) The restriction imposed by § 399 is specifically directed at a form of speech—the expression of editorial opinions—that lies at the heart of First Amendment protection, and is defined solely on the basis of the content of the suppressed speech. Section 399 singles out noncommercial broadcasters and denies them the right to address their chosen audience on matters of public importance. Pp. 381–384.

(c) Section 399's broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government. The ban impermissibly sweeps within it a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state, or local government. Pp. 386–395.

(d) The patent overinclusiveness and underinclusiveness of § 399's ban also undermines the likelihood of a genuine governmental interest in preventing private groups from propagating their own views via public broadcasting. Section 399 does not prevent the use of noncommercial stations for the presentation of partisan views on controversial matters; instead, it merely bars a station from specifically labeling such issues as its own or those of its management. Pp. 396–399.

(e) Section 399 cannot be justified on the basis of Congress' spending power as simply determining that Congress will not subsidize public broadcasting station editorials. *Regan* v. *Taxation With Representation of Washington,* 461 U. S. 540, distinguished. Since a noncommercial educational station that receives only 1% of its income from CPB grants is barred absolutely from editorializing, such a station has no way of limiting the use of its federal funds to noneditorial activities, and, more importantly, it is barred from using even private funds to finance its editorial activity. Pp. 399–401.

547 F. Supp. 379, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting statement, *post,* p. 402. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post,* p. 402. STEVENS, J., filed a dissenting opinion, *post,* p. 408.

*Samuel A. Alito, Jr.,* argued the cause for appellant. With him on the briefs were *Solicitor General Lee, Assistant*

*Attorney General McGrath, Acting Assistant Attorney General Willard, Deputy Solicitor General Bator, Anthony J. Steinmeyer,* and *Michael Jay Singer.*

*Frederic D. Woocher* argued the cause for appellees. With him on the brief were *Bill Lann Lee* and *John R. Phillips.**

JUSTICE BRENNAN delivered the opinion of the Court.

Moved to action by a widely felt need to sponsor independent sources of broadcast programming as an alternative to commercial broadcasting, Congress set out in 1967 to support and promote the development of noncommercial, educational broadcasting stations. A keystone of Congress' program was the Public Broadcasting Act of 1967, Pub. L. 90–129, 81 Stat. 365, 47 U. S. C. § 390 *et seq.*, which established the Corporation for Public Broadcasting, a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of that Act, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. 97–35, 95 Stat. 730, forbids any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing." 47 U. S. C. § 399. In this case, we are called upon to decide whether Congress, by imposing that restriction, has passed a "law . . . abridging the freedom of speech, or of the press" in violation of the First Amendment of the Constitution.

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**Larry S. Solomon* filed a brief for Mobil Corp. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Burt Neuborne* and *Charles S. Sims;* for CBS, Inc., et al. by *J. Roger Wollenberg, Timothy B. Dyk, Erwin G. Krasnow,* and *J. Laurent Scharff;* for the National Black Media Coalition by *Charles M. Firestone;* and for the Public Broadcasting Service et al. by *Lawrence A. Horn, Nancy H. Hendry,* and *Theodore D. Frank.*

## I

### A

The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself.[1] In its first efforts to regulate broadcasting, Congress made no special provision for noncommercial, educational broadcasting stations. Under the Radio Act of 1927 and the Communications Act of 1934, such stations were subject to the same licensing requirements as their commercial counterparts. As commercial broadcasting rapidly expanded during the 1930's, however, the percentage of broadcast licenses held by noncommercial stations began to shrink. In 1939, recognizing the potential effect of these commercial pressures on educational stations, the Federal Communications Commission (FCC or Commission) decided to reserve certain frequencies for educational radio, 47 CFR §§4.131–4.133 (1939), and in 1945, the Commission allocated 20 frequencies on the new FM spectrum exclusively for educational use, FCC, Report of Proposed Allocations 77 (1945). Similarly, in 1952, with the advent of television, the FCC reserved certain television channels solely for educational stations. *Television Assignments*, 41 F. C. C. 148 (1952). Helped in part by these allocations, a wide variety of noncommercial stations, some funded by state and local governments and others by private donations and foundation grants, developed during this period.[2]

It was not until 1962, however, that Congress provided any direct financial assistance to noncommercial, educational broadcasting. This first step was taken with the passage of the Educational Television Act of 1962, Pub. L. 87–447, 76 Stat. 64, which authorized the former Department of Health, Education, and Welfare (HEW) to distribute $32 million in matching grants over a 5-year period for the construction of noncommercial television facilities.

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[1] See S. Frost, Education's Own Stations 464 (1937).

[2] For a review of the history of public broadcasting, see Carnegie Commission on Educational Television, Public Television: A Program for Action 21–29 (1967) (Carnegie I); Carnegie Commission on the Future of Public Broadcasting, A Public Trust 33–34 (1979) (Carnegie II). See also S. Rep. No. 93–123, pp. 2–6 (1973).

Impetus for expanded federal involvement came in 1967 when the Carnegie Corporation sponsored a special commission to review the state of educational broadcasting. Finding that the prospects for an expanded public broadcasting system rested on "the vigor of its local stations," but that these stations were hobbled by chronic underfinancing, the Carnegie Commission called upon the Federal Government to supplement existing state, local, and private financing so that educational broadcasting could realize its full potential as a true alternative to commercial broadcasting. Carnegie I, at 33–34, 36–37.[3] In fashioning a legislative proposal to carry out this vision, the Commission recommended the creation of a nonprofit, nongovernmental "Corporation for Public Television" to provide support for noncommercial broadcasting, including funding for new program production, local station operations, and the establishment of satellite interconnection facilities to permit nationwide distribution of educational programs to all local stations that wished to receive and use them. *Id.*, at 37–38.

The Commission's report met with widespread approval, and its proposals became the blueprint for the Public Broadcasting Act of 1967, which established the basic framework of the public broadcasting system of today. Titles I and III of the Act authorized over $38 million for continued HEW construction grants and for the study of instructional television. Title II created the Corporation for Public Broadcasting (CPB or Corporation), a nonprofit, private corporation governed by a 15-person, bipartisan Board of Directors appointed by the President with the advice and consent of the Senate.[4] The Corporation was given power to fund "the production of . . . educational television or radio programs for national or regional distribution," 47 U. S. C. § 396(g)(2)(B) (1976 ed.), to make grants to local broadcasting stations that would "aid in financing local educational . . . programming costs of such stations," § 396(g)(2)(C), and to assist in the establishment and development of national interconnection facilities. § 396(g)(2)(E).[5] Aside from conferring these powers on the Corporation, Congress also adopted other measures designed both to ensure the autonomy of the Corporation and to protect the local stations from governmental interference and control. For example, all federal agencies, officers, and employees were prohibited from "exercis[ing] any direction, supervision or control" over the Corporation or local stations, § 398, and the Corporation itself was forbidden to "own or operate any television or radio broadcast station," § 396(g)(3), and was further required to "carry out its purposes and functions . . . in ways that will most effectively assure the maximum freedom . . . from interference with or control of program content" of the local stations. § 396(g)(1)(D).

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[3] Although its recommendations were later applied by Congress to noncommercial educational radio as well, the Commission's report addressed solely the problems and prospects of what it called "public television." This term was coined by the authors of the report not to distinguish noncommercial, educational broadcasting from "private" commercial broadcasting, but rather to identify a larger view of the potential of noncommercial broadcasting comprising not only "instructional" programming but also educational, political, and cultural programming broadly defined. See Carnegie I, at 1.

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[4] The structure of the Board was modified in 1981 to provide for 10, rather than 15 members. 47 U. S. C. § 396(c), as amended by Pub. L. 97-35, Title XII, § 1225(a)(1), 95 Stat. 726.

[5] In accordance with the Act, an interconnection system was formally developed in 1969 when the Public Broadcasting Service (PBS) was created. Today, PBS is a private, nonprofit membership corporation governed by a Board of Directors elected by its membership, which consists of the licensees of noncommercial, educational television stations located throughout the United States. See Brief for PBS et al. as *Amici Curiae* 1. National Public Radio (NPR) was established in 1970 and performs an analogous service for public radio stations.

## B

Appellee Pacifica Foundation is a nonprofit corporation that owns and operates several noncommercial educational broadcasting stations in five major metropolitan areas.[6] Its licensees have received and are presently receiving grants from the Corporation and are therefore prohibited from editorializing by the terms of § 399, as originally enacted and as recently amended.[7] In April 1979, appellees brought this suit in the United States District Court for the Central District of California challenging the constitutionality of former § 399. In October 1979, the Department of Justice informed both Houses of Congress and the District Court that it had decided not to defend the constitutionality of the statute.[8] The Senate then adopted a resolution directing its counsel to intervene as *amicus curiae* in support of § 399. Counsel appeared and subsequently obtained dismissal of the lawsuit for want of a justiciable controversy because the Government had decided not to enforce the statute. While appellees' appeal from this disposition was pending before the Court of Appeals for the Ninth Circuit, however, the Department of Justice under a new administration announced that it would defend the statute. The Court of Appeals then remanded the case to the District Court; the District Court permitted the Senate counsel to withdraw from the litigation, and, finding that a concrete controversy was now presented, vacated its earlier order of dismissal. While the suit was pending before the District Court, Congress, as already mentioned, see n. 7, *supra*, amended § 399 by confining the ban on editorializing to noncommercial stations that receive Corporation grants and by separately prohibiting all noncommercial stations from making political endorsements, irrespective of whether they receive federal funds. Subsequently, appellees amended their complaint to reflect this change, challenging only the ban on editorializing.[9]

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[6] In addition to Pacifica Foundation, appellees include the League of Women Voters of California, and Congressman Henry Waxman, who is a regular listener and viewer of public broadcasting.

[7] As first enacted in 1967, § 399 provided:

"No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." Pub. L. 90–129, Title II, § 201(8), 81 Stat. 368.

Although the statutory language remained the same, this provision was redesignated as § 399(a) in 1973 when subsection (b), requiring public stations to "retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed," was added. Pub. L. 93–84, § 2, 87 Stat. 219. Because appellees filed their complaint in 1979, their suit was initially directed at § 399(a). Subsection (b) was found unconstitutional by the Court of Appeals for the District of Columbia Circuit, *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 192 U. S. App. D. C. 448, 593 F. 2d 1102 (1978), and was deleted by Congress in 1981. Pub. L. 97–35, Title XII, § 1229, 95 Stat. 730.

Also as part of those 1981 amendments, Congress revised and redesignated former § 399(a) by confining the ban on editorializing to stations receiving CPB grants and by separately prohibiting political endorsements by all stations; § 399 in its current form provides in full:

"No noncommercial educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office." 47 U. S. C. § 399.

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[8] As then Attorney General Civiletti explained:

"After careful consideration, we have concluded that Section [399] violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. . . .

"The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute." Letter from Attorney General Benjamin R. Civiletti to Senate Majority Leader Robert C. Byrd (Oct. 11, 1979), App. 13–14.

[9] In their amended complaint, appellees did not challenge the provision in § 399 prohibiting all noncommercial educational broadcasting stations from "support[ing] or oppos[ing] any candidate for public office." Neither

The District Court granted summary judgment in favor of appellees, holding that § 399's ban on editorializing violated the First Amendment. 547 F. Supp. 379 (1982). The court rejected the Federal Communication Commission's contention that "§ 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government." *Id.*, at 384–385. Noting the diverse sources of funding for noncommercial stations, the protections built into the Public Broadcasting Act to ensure that noncommercial broadcasters remain free of governmental influence, and the requirements of the FCC's fairness doctrine which are designed to guard against one-sided presentation of controversial issues, the District Court concluded that the asserted fear of Government control was not sufficiently compelling to warrant § 399's restriction on speech. *Id.*, at 386. The court also rejected the contention that the restriction on editorializing as necessary to ensure that Government funding of noncommercial broadcast stations does not interfere with the balanced presentation of opinion on those stations. *Id.*, at 387. The FCC appealed from the District Court judgment

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party suggests that the two sentences of § 399 are so inseverable that we may not consider the constitutionality of one without also reviewing the other. Indeed, as the Federal Communications Commission explained before the District Court, "[n]ew section 399 does more than reinforce the severability of the two provisions by setting them forth in separate sentences," it also confines the ban on editorializing to stations that receive CPB grants while extending a separate ban on political endorsements to all public stations. Defendant's Supplemental Memorandum on Amendment of Section 399, p. 4 (Sept. 15, 1981). We therefore express no view of the constitutionality of the second sentence in § 399. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788, n. 26 (1978) (noting that "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office"—a separate restriction not challenged in that case).

directly to this Court pursuant to 28 U. S. C. § 1252. We postponed consideration of the question of our jurisdiction to the merits, 460 U. S. 1010 (1983),[10] and we now affirm.

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[10] Relying on our recent decision in *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56 (1982) *(per curiam)*, appellees contend that we lack jurisdiction because the FCC filed its notice of appeal while a motion to amend the District Court's judgment was still pending. Our decision in *Griggs*, however, rested squarely on the plain language of new Federal Rule of Appellate Procedure 4(a)(4), which specifically provides: "A notice of appeal filed before the disposition of [a Rule 59(e) motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion . . . ." See 459 U. S., at 61. Because this case comes to us directly from the District Court via 28 U. S. C. § 1252, the question whether the FCC's notice of appeal was effective to vest this Court with appellate jurisdiction turns not on Rule 4(a)(4), but rather on our own Rule 11.3. The express language of Rule 4(a)(4) found dispositive in *Griggs* has no direct equivalent in our Rule 11.3, which simply provides that "if a petition for rehearing is timely filed by any party . . . , the time for filing the notice of appeal . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment." By its terms, therefore, our Rule does not determine whether a notice of appeal filed during the pendency of a motion to amend is ineffective to vest appellate jurisdiction in this Court. We have observed, however, that the filing of a petition for rehearing or a motion to amend or alter the judgment "suspend[s] the finality of the [original] judgment," thereby extending the time for filing a notice of appeal "until [the lower court's] denial of the motion . . . restores" that finality. *Communist Party of Indiana* v. *Whitcomb*, 414 U. S. 441, 445 (1974). At the same time, we have emphasized that the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a postjudgment motion for reconsideration applies only when such a motion actually seeks an "alteration of the rights adjudicated" in the court's first judgment. *Department of Banking of Nebraska* v. *Pink*, 317 U. S. 264, 266 (1942) *(per curiam)*; see also *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211 (1952) ("mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which review must be sought").

The FCC has brought this appeal pursuant to § 1252, which permits direct appeal to this Court from "an interlocutory or a final judgment . . . holding an Act of Congress unconstitutional." Section 1252 departs significantly from the general congressional policy of minimizing the manda-

## II

We begin by considering the appropriate standard of review. The District Court acknowledged that our decisions

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tory docket of this Court and reflects instead Congress' "unambiguou[s] mandat[e]" that we afford immediate direct review of all decisions that call into doubt the constitutionality of Acts of Congress. *McLucas* v. *DeChamplain*, 421 U. S. 21, 31 (1975). It is clear that the motion filed by the FCC following the entry of the District Court's August 6 order was directed not at the court's judgment holding § 399 unconstitutional, but rather at the wholly collateral issue of whether appellees were entitled to recover attorney's fees and costs. Prior to the court's decision, the question of attorney's fees had never been briefed or discussed by the parties; nevertheless, the court, acting *sua sponte*, included in its August 6 order an award of "reasonable attorneys' fees and costs" to appellees. Recognizing that the court's order had been entered in the absence of any application for fees and without benefit of briefing, the FCC sought, through its postjudgment motion, to restore the status quo ante with respect to the question of fees in order to allow time for full briefing. The District Court, in an order entered November 1, did precisely that by striking the award of attorney's fees from the August 6 order, and taking the question of fees under advisement.

As we recognized in *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445 (1982), an "award [of attorney's fees] is uniquely separable from the cause of action" that is settled by a court's judgment on the merits, and therefore a postjudgment request for attorney's fees is not considered a motion to amend or alter the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. *Id.*, at 452. Since, as appellees concede, the FCC's motion in this case related solely to the "uniquely separable" question of attorney's fees and was in no way directed at the District Court's judgment "holding an Act of Congress unconstitutional," 28 U. S. C. § 1252, it is true here, as it was in *Department of Banking* v. *Pink*, *supra*, that the District Court was not asked to "alter its adjudication of the rights of the parties," and consequently the finality of the judgment which the FCC seeks to have reviewed "was never suspended." *Id.*, at 266. Accordingly, we think the time for filing the FCC's notice of appeal was properly calculated from the date the District Court's initial judgment was rendered, and its notice is therefore timely within 28 U. S. C. § 2101(a). A different result would frustrate the clear purpose of § 1252 to permit "prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress." H. R. Rep. No. 212, 75th Cong., 1st Sess., 2 (1937), since an appeal from a judgment have generally applied a different First Amendment standard for broadcast regulation than in other areas, but after finding that no special characteristic of the broadcast media justified application of a less stringent standard in this case, it held that § 399 could survive constitutional scrutiny only if it served a "compelling" governmental interest. 547 F. Supp., at 384. Claiming that the court drew the wrong lessons from our prior decisions concerning broadcast regulation, the Government contends that a less demanding standard is required. It argues that Congress may, consistently with the First Amendment, exercise broad power to regulate broadcast speech because the medium of broadcasting is subject to the "special characteristic" of spectrum scarcity—a characteristic not shared by other media—which calls for more exacting regulation. This power, in the Government's view, includes authority to restrict the ability of all broadcasters, both commercial and noncommercial, to editorialize. Brief for Appellant 31. Moreover, given the unique role of noncommercial broadcasting as a source of "programming excellence and diversity that the commercial sector could not or would not produce," *id.*, at 33, Congress was entitled to impose special restrictions such as § 399 upon these stations. The Government concludes by urging that § 399 is an appropriate and essential means of furthering "important" governmental interests, *id.*, at 34, 35, 39, which leaves open the possibility that a wide variety of views on matters of public importance can be expressed through the medium of noncommercial educational broadcasting.

At first glance, of course, it would appear that the District Court applied the correct standard. Section 399 plainly operates to restrict the expression of editorial opinion on matters of public importance, and, as we have repeatedly explained, communication of this kind is entitled to the most

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"holding an Act of Congress unconstitutional" would be delayed by collateral issues having no bearing whatever on the judgment from which the appeal is taken.

exacting degree of First Amendment protection. *E. g., Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U. S. 575, 585 (1983); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776–777 (1978); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102 (1940). Were a similar ban on editorializing applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment. *E. g., Mills* v. *Alabama*, 384 U. S. 214 (1966). But, as the Government correctly notes, because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve "compelling" governmental interests. At the same time, we think the Government's argument loses sight of concerns that are important in this area and thus misapprehends the essential meaning of our prior decisions concerning the reach of Congress' authority to regulate broadcast communication.

The fundamental principles that guide our evaluation of broadcast regulation are by now well established. First, we have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable national resource. The distinctive feature of Congress' efforts in this area has been to ensure through the regulatory oversight of the FCC that only those who satisfy the "public interest, convenience, and necessity" are granted a license to use radio and television broadcast frequencies. 47 U. S. C. § 309(a).[11]

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[11] See *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 799–800 (1978); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 101–102 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 387–390 (1969); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216 (1943); *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933).

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent

Second, Congress may, in the exercise of this power, seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations. Although such governmental regulation has never been allowed with respect to the print media, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), we have recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 386 (1969). The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that "[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 101 (1973). Thus, our cases have taught that, given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting "those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves." *Red Lion, supra*, at 389. As we observed in that case, because "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, . . . the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences [through the medium of broadcasting]

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of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. See, *e. g.*, Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Texas L. Rev. 207, 221–226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

is crucial here [and it] may not constitutionally be abridged either by Congress or by the FCC." 395 U. S., at 390.

Finally, although the Government's interest in ensuring balanced coverage of public issues is plainly both important and substantial, we have, at the same time, made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area. Unlike common carriers, broadcasters are "entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties].'" *CBS, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981) (quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 110). See also *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 703 (1979). Indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 124–127.

Our prior cases illustrate these principles. In *Red Lion*, for example, we upheld the FCC's "fairness doctrine"—which requires broadcasters to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflects the opposing views—because the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in this limited medium and yet posed no threat that a "broadcaster [would be denied permission] to carry a particular program or to publish his own views." 395 U. S., at 396.[12] Similarly, in *CBS, Inc.* v. *FCC*, *supra*, the

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[12] We note that the FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chill-

Court upheld the right of access for federal candidates imposed by § 312(a)(7) of the Communications Act both because that provision "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process," *id.*, at 396, and because it defined a sufficiently "*limited* right of 'reasonable' access" so that "the discretion of broadcasters to present their views on any issue or to carry any particular type of programming" was not impaired. *Id.*, at 396–397 (emphasis in original). Finally, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* the Court affirmed the FCC's refusal to require broadcast licensees to accept all paid political advertisements. Although it was argued that such a requirement would serve the public's First Amendment interest in receiving additional views on public issues, the Court rejected this approach, finding that such a requirement would tend to transform broadcasters into common carriers and would intrude unnecessarily upon the editorial discretion of broadcasters. *Id.*, at 123–125. The FCC's ruling, therefore, helped to advance the important purposes of the Communications Act, grounded in the First Amendment, of preserving the right of broadcasters to exercise "the widest journalistic freedom consistent with [their] public obligations," and of guarding against "the risk of an enlarge-

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ing speech, do not serve the public interest, and has therefore proposed to repeal them. Notice of Proposed Rulemaking In re Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28298, 28301 (1983). Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. As we recognized in *Red Lion,* however, were it to be shown by the Commission that the fairness doctrine "[has] the net effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case. 395 U. S., at 393.

ment of Government control over the content of broadcast discussion of public issues." *Id.*, at 110, 126.[13]

Thus, although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. As a result of these restrictions, of course, the absolute freedom to advocate one's own positions without also presenting opposing viewpoints—a freedom enjoyed, for example, by newspaper publishers and soapbox orators—is denied to broadcasters. But, as our cases attest, these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues, *e. g., Red Lion*, 395 U. S., at 377. See also *CBS, Inc.* v. *FCC, supra*, at 396–397; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S., at 110–111; *Red Lion, supra*, at 396. Making that judgment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case. *E. g., FCC* v. *Pacifica Foundation,* 438 U. S. 726 (1978).

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[13] This Court's decision in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), upholding an exercise of the Commission's authority to regulate broadcasts containing "indecent" language as applied to a particular afternoon broadcast of a George Carlin monologue, is consistent with the approach taken in our other broadcast cases. There, the Court focused on certain physical characteristics of broadcasting—specifically, that the medium's uniquely pervasive presence renders impossible any prior warning for those listeners who may be offended by indecent language, and, second, that the ease with which children may gain access to the medium, especially during daytime hours, creates a substantial risk that they may be exposed to such offensive expression without parental supervision. *Id.*, at 748–749. The governmental interest in reduction of those risks through Commission regulation of the timing and character of such "indecent broadcasting" was thought sufficiently substantial to outweigh the broadcaster's First Amendment interest in controlling the presentation of its programming. *Id.*, at 750. In this case, by contrast, we are faced not with indecent expression, but rather with expression that is at the core of First Amendment protections, and no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial "nuisance" of the kind addressed in *FCC* v. *Pacifica Foundation*.

## III

We turn now to consider whether the restraint imposed by § 399 satisfies the requirements established by our prior cases for permissible broadcast regulation. Before assessing the Government's proffered justifications for the statute, however, two central features of the ban against editorializing must be examined, since they help to illuminate the importance of the First Amendment interests at stake in this case.

### A

First, the restriction imposed by § 399 is specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection. In construing the reach of the statute, the FCC has explained that "although the use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensee's own views on public issues is therefore not to be permitted, such prohibition should not be construed to inhibit any *other* presentations on controversial issues of public importance." *Accuracy in Media, Inc.,* 45 F. C. C. 2d 297, 302 (1973) (emphasis added). The Commission's interpretation of § 399 simply highlights the fact that what the statute forecloses is the expression of editorial opinion on "controversial issues of public importance." As we recently reiterated in *NAACP* v. *Claiborne Hardware Co.,* 458 U. S. 886 (1982), "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Id.,* at 913 (quoting *Carey* v. *Brown,* 447 U. S. 455, 467 (1980)). And we have emphasized:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to

> discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S., at 101–102.

The editorial has traditionally played precisely this role by informing and arousing the public, and by criticizing and cajoling those who hold government office in order to help launch new solutions to the problems of the time. Preserving the free expression of editorial opinion, therefore, is part and parcel of "a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). As we recognized in *Mills* v. *Alabama*, 384 U. S. 214 (1966), the special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press, of which the broadcasting industry is indisputably a part, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs. Indeed, the pivotal importance of editorializing as a means of satisfying the public's interest in receiving a wide variety of ideas and views through the medium of broadcasting has long been recognized by the FCC; the Commission has for the past 35 years actively encouraged commercial broadcast licensees to include editorials on public affairs in their programming.[14]

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[14] In 1949, finding that "programs in which the licensee's personal opinions are expressed are [not] intrinsically more or less subject to abuse than any other program devoted to public issues," the FCC concluded that overt licensee editorializing, so long as "it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints" is "consistent with the licensee's duty to

Because § 399 appears to restrict precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is "indispensable to the discovery and spread of political truth"—we must be especially careful in weighing the interests that are asserted in support of this restriction and in assessing the precision with which the ban is crafted. *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

Second, the scope of § 399's ban is defined solely on the basis of the content of the suppressed speech. A wide variety of noneditorial speech "by licensees, their management or those speaking on their behalf," *Accuracy in Media, Inc.*, 45 F. C. C. 2d, at 302, is plainly not prohibited by § 399. Examples of such permissible forms of speech include daily announcements of the station's program schedule or over-the-air appeals for contributions from listeners. Consequently, in order to determine whether a particular statement by station management constitutes an "editorial" proscribed by § 399, enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern "controversial issues of public importance." *Ibid.*

As JUSTICE STEVENS observed in *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530 (1980), however: "A regulation of speech that is motivated by nothing

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operate in the public interest." *Editorializing by Broadcast Licensees*, 13 F. C. C. 1246, 1253, 1258 (1949). At the time, of course, this decision applied with equal force to both noncommercial educational licensees and commercial stations. The FCC has since underscored its view that editorializing by broadcast licensees serves the public interest by identifying editorial programming as one of 14 "major elements usually necessary to meet the public interest, needs and desires of the community." FCC Programming Statement, 25 Fed. Reg. 7295 (1960). The Commission has regularly enforced this policy by considering a licensee's editorializing practices in license renewal proceedings. See, *e. g.*, *Greater Boston Television Corp.* v. *FCC*, 143 U. S. App. D. C. 383, 402, 444 F. 2d 841, 860 (1970); *Evening Star Broadcasting Co.*, 27 F. C. C. 2d 316, 332 (1971); *RKO General, Inc.*, 44 F. C. C. 2d 149, 219 (1969).

more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.' A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly such a regulation." *Id.*, at 546 (opinion concurring in judgment); accord, *id.*, at 537–540 (majority opinion). Section 399 is just such a regulation, for it singles out noncommercial broadcasters and denies them the right to address their chosen audience on matters of public importance. Thus, in enacting § 399 Congress appears to have sought, in much the same way that the New York Public Service Commission had attempted through the regulation of utility company bill inserts struck down in *Consolidated Edison*, to limit discussion of controversial topics and thus to shape the agenda for public debate. Since, as we observed in *Consolidated Edison*, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic," *id.*, at 537, we must be particularly wary in assessing § 399 to determine whether it reflects an impermissible attempt "to allow a government [to] control . . . the search for political truth." *Id.*, at 538.[15]

### B

In seeking to defend the prohibition on editorializing imposed by § 399, the Government urges that the statute was aimed at preventing two principal threats to the overall success of the Public Broadcasting Act of 1967. According to this argument, the ban was necessary, first, to protect noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for Government propagandizing or the objects of governmental influence; and, second, to keep these stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints.[16] By seeking to safeguard the public's right to a balanced presentation of public issues through the prevention of either governmental or private bias, these objectives are, of course, broadly consistent with the goals identified in our earlier broadcast regulation cases. But, in sharp contrast to the restrictions upheld in *Red Lion* or in *CBS, Inc.* v. *FCC*, which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner. The Government insists, however, that the hazards posed in the "special" circumstances of noncommercial educational broadcasting are so great that § 399 is an indispensable means of preserving the public's First Amendment interests. We disagree.

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[15] See also *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65 (1983); *Carey* v. *Brown*, 447 U.S. 455, 462–463 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 784–785; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95–96 (1972).

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[16] The Government also contends that § 399 is intended to prevent the use of taxpayer moneys to promote private views with which taxpayers may disagree. This argument is readily answered by our decision in *Buckley* v. *Valeo*, 424 U. S. 1, 90–93 (1976) *(per curiam)*. As we explained in that case, virtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object. *Id.*, at 91–92. Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech. And, unlike *Wooley* v. *Maynard*, 430 U. S. 705 (1977), this is not a case in which an individual taxpayer is forced in his daily life to identify with particular views expressed by educational broadcasting stations. Even if this were a serious interest, it is belied by the underinclusiveness of § 399. The Government concedes—indeed it insists—that all sorts of controversial speech are subsidized by the 1967 Act, and yet out of all of this potentially objectionable speech, only the expression of editorial opinion by local stations is selected for suppression. If angry taxpayers were really the central, animating concern of Congress when it passed the 1967 Act, then § 399 does not go far enough in suppressing controversial speech in this medium. That the provision is so unrelated to this asserted purpose suggests that the Government's interest is not substantial. Cf. *Buckley* v. *Valeo, supra,* at 45; *First National Bank of Boston* v. *Bellotti, supra,* at 793.

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When Congress first decided to provide financial support for the expansion and development of noncommercial educational stations, all concerned agreed that this step posed some risk that these traditionally independent stations might be pressured into becoming forums devoted solely to programming and views that were acceptable to the Federal Government. That Congress was alert to these dangers cannot be doubted. It sought through the Public Broadcasting Act to fashion a system that would provide local stations with sufficient funds to foster their growth and development while preserving their tradition of autonomy and community-orientation.[17] A cardinal objective of the Act was the es-

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[17] The Senate Report concerning the Act, for example, explained:

"There is general agreement that for the time being, Federal financial assistance is required to provide the resources necessary for quality programs. It is also recognized that this assistance should in no way involve the Government in programming or program judgments. An independent entity supported by Federal funds is required to provide programs free of political pressures. The Corporation for Public Broadcasting, a nonprofit private corporation, . . . provides such an entity." S. Rep. No. 222, 90th Cong., 1st Sess., 4 (1967).

"Your committee has heard considerable discussion about the fear of Government control or interference in programming if [the Act] is enacted. We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast." *Id.*, at 11. See also The Public Television Act of 1967: Hearings on S. 1160 before the Subcommittee on Communications of the Senate Committee on Commerce, 90th Cong., 1st Sess., 9 (1967) (remarks of Sen. Pastore).

The House Report echoed the same concerns:

"Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation, directed by a Board of Directors, none of whom will be Government tablishment of a private corporation that would "facilitate the development of educational radio and television broadcasting and . . . afford maximum protection to such broadcasting from extraneous interference and control." 47 U. S. C. § 396(a)(6) (1976 ed.).

The intended role of § 399 in achieving these purposes, however, is not as clear. The provision finds no antecedent in the Carnegie report, which generally provided the model for most other aspects of the Act. It was not part of the administration's original legislative proposal. And it was not included in the original version of the Act passed by the Senate. The provision found its way into the Act only as a result of an amendment in the House. Indeed, it appears that, as the House Committee Report frankly admits, § 399 was added not because Congress thought it was essential to preserving the autonomy and vitality of local stations, but rather "[o]ut of an abundance of caution." H. R. Rep. No. 572, 90th Cong., 1st Sess., 20 (1967).[18]

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employees, will provide the most effective insulation from Government control or influence over the expenditure of funds." H. R. Rep. No. 572, 90th Cong., 1st Sess., 15 (1967).

"[L]ocal stations shall retain both the opportunity and responsibility for broadcasting programs they feel best serve their communities. Similarly, the local station alone will make the decision whether or not to participate in any interconnection arrangements . . . ." *Id.*, at 18.

[18] The legislative history surrounding § 399 also suggests that a variety of reasons lay behind the decision to include it as part of the Act. Although some supporters of § 399 plainly were concerned that permitting editorializing might create a risk that noncommercial stations would be subjected to undue governmental influence and thereby become vehicles for governmental propaganda, see 113 Cong. Rec. 26383 (1967) (remarks of Rep. Staggers), other supporters of the provision appear to have been more concerned with preventing the possibility that these stations would criticize Government officials. Representative Springer, the provision's chief sponsor and the ranking minority member of the House Committee that reported out the bill containing § 399, explained that his concerns were due at least in part to the fact that "[t]here are some of us who have very strong feelings because they have been editorialized against." Hearings

More importantly, an examination of both the overall legislative scheme established by the 1967 Act and the character of public broadcasting demonstrates that the interest asserted by the Government is not substantially advanced by § 399. First, to the extent that federal financial support creates a risk that stations will lose their independence through the bewitching power of governmental largesse, the elaborate structure established by the Public Broadcasting Act

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on H. R. 6736 and S. 1160 before the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., 641 (1967) (House Hearings). See also 113 Cong. Rec. 26391 (1967) (remarks of Rep. Joelson). Indeed, during hearings on the bill, the Committee heard a variety of views on the question of editorializing by noncommercial educational stations. Some witnesses felt that editorials of any kind would be inappropriate, see, *e. g.*, House Hearings, at 513–514 (remarks of William Harley, President, National Association of Educational Broadcasters), while others took a different view, explaining that although specific endorsements of political candidates would be inappropriate, editorials concerning civic affairs and other matters of public concern would be an important part of responsible educational broadcasting, see, *e. g.*, *id.*, at 391–392 (remarks of McGeorge Bundy, President, Ford Foundation); *id.*, at 640–642 (remarks of Dr. Samuel Gould, Joint Council on Educational Telecommunications). After the House passed H. R. 6736, the Senate, disagreeing with the addition of § 399, requested a Conference and only receded from its disagreement "when it was explained that the prohibition . . . was limited to providing that no noncommercial educational broadcast station may broadcast editorials representing the opinion of the management of such station . . . [and that] these provisions are not intended to preclude balanced, fair, and objective presentations of controversial issues . . . ." H. R. Conf. Rep. No. 794, 90th Cong., 1st Sess., 12 (1967).

Of course, as the Government points out, Congress has consistently retained the basic proscription on editorializing in § 399, despite periodic reconsiderations and modifications of the Act in 1973, 1978, and 1981. Brief for Appellant 25–27; see also n. 7, *supra*. A reviewing court may not easily set aside such a considered congressional judgment. At the same time, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843–844 (1978).

already operates to insulate local stations from governmental interference. Congress not only mandated that the new Corporation for Public Broadcasting would have a private, bipartisan structure, see §§ 396(c)–(f), but also imposed a variety of important limitations on its powers. The Corporation was prohibited from owning or operating any station, § 396(g)(3), it was required to adhere strictly to a standard of "objectivity and balance" in disbursing federal funds to local stations, § 396(g)(1)(A), and it was prohibited from contributing to or otherwise supporting any candidate for office, § 396(f)(3).

The Act also established a second layer of protections which serve to protect the stations from governmental coercion and interference. Thus, in addition to requiring the Corporation to operate so as to "assure the maximum freedom [of local stations] from interference with or control of program content or other activities," § 396(g)(1)(D), the Act expressly forbids "any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors . . . ," § 398(a) (1976 ed.). Subsequent amendments to the Act have confirmed Congress' commitment to the principle that because local stations are the "bedrock of the system," their independence from governmental interference and control must be fully guaranteed. These amendments have provided long-term appropriations authority for public broadcasting, rather than allowing funding to depend upon yearly appropriations, see § 396(k)(1)(C), as amended, Pub. L. 97–35, Title XII, § 1227, 95 Stat. 727; have strictly defined the percentage of appropriated funds that must be disbursed by the Corporation to local stations, § 396(k)(3) (A)–(B); and have defined objective criteria under which local television and radio stations receive basic grants from the Corporation to be used at the discretion of the station. §§ 396(k)(6)(A)–(B), 396(k)(7). The principal thrust of the amendments, therefore, has been to assure long-term appropriations for the Corporation and, more importantly, to insist that it pass specified portions of these funds directly through to local stations to give them greater autonomy in defining the uses to which those funds should be put. Thus, in sharp contrast to § 399, the unifying theme of these various statutory provisions is that they substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern.[19]

Even if these statutory protections were thought insufficient to the task, however, suppressing the particular category of speech restricted by § 399 is simply not likely, given the character of the public broadcasting system, to reduce substantially the risk that the Federal Government will seek to influence or put pressure on local stations. An underlying supposition of the Government's argument in this regard is that individual noncommercial stations are likely to speak so forcefully on particular issues that Congress, the ultimate source of the stations' federal funding, will be tempted to retaliate against these individual stations by restricting appropriations for all of public broadcasting. But, as the District Court recognized, the character of public broadcasting suggests that such a risk is speculative at best. There are literally hundreds of public radio and television stations in communities scattered throughout the United States and its territories, see CPB, 1983–84 Public Broadcasting Directory 20–50, 66–86 (Sept. 1983). Given that central fact, it seems reasonable to infer that the editorial voices of these stations will prove to be as distinctive, varied, and idiosyncratic as the various communities they represent. More importantly, the editorial focus of any particular station can fairly be expected to focus largely on issues affecting only its community.[20] Accordingly, absent some showing by the Government to the contrary, the risk that local editorializing will place all of public broadcasting in jeopardy is not sufficiently pressing to warrant § 399's broad suppression of speech.

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[19] Furthermore, the risk that federal coercion or influence will be brought to bear against local stations as a result of federal financing is considerably attenuated by the fact that CPB grants account for only a portion of total public broadcasting income. CPB, Public Broadcasting Income: Fiscal Year 1982, Table 2 (Final Report, Dec. 1983) (noting that federal funds account for 23.4% of total income for all public broadcasting stations). The vast majority of financial support comes instead from state and local governments, as well as a wide variety of private sources, including foundations, businesses, and individual contributions; indeed, as the CPB recently noted, "[t]he diversity of support in America for public broadcasting is remarkable," CPB, 1982 Annual Report 2 (1982). Given this diversity of funding sources and the decentralized manner in which funds are secured, the threat that improper federal influence will be exerted over local stations is not so pressing as to require the total suppression of editorial speech by these stations.

Indeed, what is far more likely than local station editorials to pose the kinds of dangers hypothesized by the Government are the wide variety of programs addressing controversial issues produced, often with substantial CPB funding, for national distribution to local stations. Such programs truly have the potential to reach a large audience and, because of the critical commentary they contain, to have the kind of genuine national impact that might trigger a congressional response or kindle governmental resentment. The ban imposed by § 399, however, is plainly not directed at the potentially controversial content of such programs; it is, instead, leveled solely at the expression of editorial opinion by local station management, a form of expression that is far more likely to be aimed at a smaller local audience, to have less national impact, and to be confined to local issues. In contrast, the Act imposes no substantive restrictions, other than normal requirements of balance and fairness, on those who produce nationally distributed programs. Indeed, the Act is designed in part to encourage and sponsor the production of such programs and to allow each station to decide for itself whether to accept such programs for local broadcast.[21]

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[20] This likelihood is enhanced with respect to public stations because they are required to establish community advisory boards which must reasonably reflect the "diverse needs and interests of the communities served by such station[s]." § 396(k)(9)(A). For a review of sample topics of broadcast editorializing, see Fang & Whelan, Survey of Television Editorials and Ombudsman Segments, 17 J. Broadcasting 363 (1973); see also E. Routt, Dimensions of Broadcast Editorializing (1974).

Furthermore, the manifest imprecision of the ban imposed by § 399 reveals that its proscription is not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech. Section

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[21] Congressional experience with the Act following its passage in 1967 has reaffirmed its commitment to preserving broad editorial discretion for local stations in determining the content of their schedules and programming. This experience also suggests that those critical reactions to public broadcasting that have occurred have focused not on the exercise of such editorial judgments by local stations but rather on controversial programming produced for national distribution, which has included critical commentary on public affairs. In 1972, claiming that the centralization of program production was usurping the role of local stations, then President Nixon vetoed a bill establishing 2-year appropriations authority for CPB funding. See Carnegie II, at 41–43. In addition, the administration was critical of certain of the best known nationally distributed public affairs programs, such as "Bill Moyer's Journal" and "Washington Week in Review," which were regarded by some as too controversial. See Canby, The First Amendment and the State as Editor: Implications for Public Broadcasting, 52 Texas L. Rev. 1123, 1156–1157 (1974). These events prompted Congress to undertake its first thorough review of the public broadcasting system since the enactment of the Public Broadcasting Act. See S. Rep. No. 93–123, p. 12 (1973). The result of that review was a firm congressional commitment to developing long-range financing for public broadcasting to "provide adequate insulation against Government interference," *id.*, at 14, and to ensuring an "increase [in] both the percentage and amount of unrestricted support available to public television stations" "[in order to ensure] strong local programming made possible by a predictable level of community service [*i. e.*, unrestricted] grants." H. R. Rep. No. 93–324, pp. 7, 9 (1973). These themes have been carried forward in subsequent amendments to the Act, see Pub. L. 95–567, § 307, 92 Stat. 2415, and Pub. L. 97–35, § 1227, 95 Stat. 727.

399 includes within its grip a potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidacies, or elections. Indeed, the breadth of editorial commentary is as wide as human imagination permits. But the Government never explains how, say, an editorial by local station management urging improvements in a town's parks or museums will so infuriate Congress or other federal officials that the future of public broadcasting will be imperiled unless such editorials are suppressed. Nor is it explained how the suppression of editorials alone serves to reduce the risk of governmental retaliation and interference when it is clear that station management is fully able to broadcast controversial views so long as such views are not labeled as its own. See *infra*, at 396, and n. 25.

The Government appears to recognize these flaws in § 399, because it focuses instead on the suggestion that the source of governmental influence may well be state and local governments, many of which have established public broadcasting commissions that own and operate local noncommercial educational stations.[22] The ban on editorializing is all the more necessary with respect to these stations, the argument runs, because the management of such stations will be especially likely to broadcast only editorials that are favorable to the state or local authorities that hold the purse strings. The Government's argument, however, proves too much. First, § 399's ban applies to the many private noncommercial community organizations that own and operate stations that are not controlled in any way by state or local government. Second, the legislative history of the Public Broadcasting Act clearly indicates that Congress was concerned with "assur[ing] complete freedom from any *Federal Government influence.*" The Public Television Act of 1967: Hearings on S. 1160 before the Subcommittee on Communications of the Senate Committee on Commerce, 90th Cong., 1st Sess., 9 (1967) (remarks of Sen. Pastore) (emphasis added).[23] Consistently with this concern, Congress refused to create any federally owned stations and it expressly forbade the CPB to own or operate any television or radio stations, § 396(g)(3). By contrast, although Congress was clearly aware in 1967 that many noncommercial educational stations were owned by state and local governments, it did not hesitate to extend federal assistance to such stations, it imposed no special requirements to restrict state or local control over these stations, and, indeed, it ensured through the structure of the Act that these stations would be as insulated from federal interference as the wholly private stations.[24]

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[22] As the Government points out in its brief, at least two-thirds of the public television broadcasting stations in operation are licensed to (a) state public broadcasting authorities or commissions, in which commission members are often appointed by the governor with the advice and consent of the state legislature, (b) state universities or educational commissions, or (c) local school boards or municipal authorities. Brief for Appellant 20, nn. 43, 44; see also CPB, 1983–84 CPB Public Broadcasting Directory 5–8, 66–86 (Sept. 1983).

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[23] See also Hearings on S. 1160, at 93 (remarks of FCC Chairman Hyde); Special Message to the Congress: "Education and Health in America," 1 Public Papers of the Presidents, Lyndon B. Johnson, Feb. 28, 1967, p. 250 (1967) ("Non-commercial television and radio in America, even though supported by federal funds, must be absolutely free from any federal government interference over programming"); see also 113 Cong. Rec. 26384 (1967) (remarks of Rep. Staggers); H. R. Rep. No. 572, 90th Cong., 1st Sess., 18–19 (1967); S. Rep. No. 222, 90th Cong., 1st Sess., 7–8, 11 (1967).

[24] We note in this regard that in 1977 the administration, observing that § 399's ban appeared to "mak[e] sense for stations licensed to a State or local government instrumentalit[ies]" but not for nongovernmental licensees, proposed that the statute be amended to permit editorializing by all stations not licensed to governmental entities. President's Message on Public Broadcasting (Oct. 6, 1977), reprinted in H. R. Rep. No. 95–1178, p. 9 (1978). The House, however, went further and passed H. R. 12605, which, among other things, amended § 399 by deleting entirely the ban on editorializing while retaining the ban on political endorsements. 124 Cong. Rec. 19937 (1978); see also H. R. Rep. No. 95–1178, *supra*, at 31. The Senate then passed an amended version of H. R. 12605, which retained § 399 in its original form. 124 Cong. Rec. 30081 (1978). At conference,

Finally, although the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the Government, this interest can be fully satisfied by less restrictive means that are readily available. To address this important concern, Congress could simply require public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding. Such a disclaimer—similar to those often used in commercial and noncommercial programming of a controversial nature—would effectively and directly communicate to the audience that the editorial reflected only the views of the station rather than those of the Government. Furthermore, such disclaimers would have the virtue of clarifying the responses that might be made under the fairness doctrine by opponents of the station's position, since those opponents would know with certainty that they were responding only to the station's views and not in any sense to the Government's position.

In sum, § 399's broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government. The regulation impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state, or local government.

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the House receded from its disagreement and § 399 was retained. H. R. Conf. Rep. No. 95-1774, p. 35 (1978). Whether a prohibition on editorializing restricted to the licensees of state and local governmental entities would pass constitutional muster is a question we need not decide.

(2)

Assuming that the Government's second asserted interest in preventing noncommercial stations from becoming a "privileged outlet for the political and ideological opinions of station owners and managers," Brief for Appellant 34, is legitimate, the substantiality of this asserted interest is dubious. The patent overinclusiveness and underinclusiveness of § 399's ban "undermines the likelihood of a genuine [governmental] interest" in preventing private groups from propagating their own views via public broadcasting. *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 793. If it is true, as the Government contends, that noncommercial stations remain free, despite § 399, to broadcast a wide variety of controversial views through their power to control program selection, to select which persons will be interviewed, and to determine how news reports will be presented, Brief for Appellant 41, then it seems doubtful that § 399 can fairly be said to advance any genuinely substantial governmental interest in keeping controversial or partisan opinions from being aired by noncommercial stations. Indeed, since the very same opinions that cannot be expressed by the station's management may be aired so long as they are communicated by a commentator or by a guest appearing at the invitation of the station during an interview, *ibid.*; see also *Accuracy in Media*, 45 F. C. C. 2d, at 302, § 399 clearly "provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 564 (1980). Cf. *Buckley* v. *Valeo*, 424 U. S., at 45; *First National Bank of Boston* v. *Bellotti*, *supra*, at 793.[25]

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[25] When it determined in 1949 that broadcast editorializing served the public interest, the FCC recognized precisely this fact: "It is clear that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity . . . to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts,

In short, § 399 does not prevent the use of noncommercial stations for the presentation of partisan views on controversial matters; instead, it merely bars a station from specifically communicating such views on its own behalf or on behalf of its management. If the vigorous expression of controversial opinions is, as the Government assures us, affirmatively encouraged by the Act, and if local licensees are permitted under the Act to exercise editorial control over the selection of programs, controversial or otherwise, that are aired on their stations, then § 399 accomplishes only one thing—the suppression of editorial speech by station management. It does virtually nothing, however, to reduce the risk that public stations will serve solely as outlets for expression of narrow partisan views. What we said in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* applies, therefore, with equal force here: the "sacrifice [of] First Amendment protections for so speculative a gain is not warranted . . . ." 412 U. S., at 127.

Finally, the public's interest in preventing public broadcasting stations from becoming forums for lopsided presentations of narrow partisan positions is already secured by

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whether or not these views are expressly identified with the licensee." *Editorializing by Broadcast Licensees*, 13 F. C. C., at 1252. The Commission nonetheless rejected the contention that overt advocacy by licensees would be contrary to the public interest. Instead, the FCC found that "these fears are largely misdirected . . . they stem from a confusion of the question of overt advocacy in the name of the licensee, with the broader issue of insuring that the station's broadcasts devoted to the consideration of public issues will provide the listening public with a fair and balanced presentation of differing viewpoints on such issues. . . . If it be true that station good will and licensee prestige, where it exists, may give added weight to opinion expressed by the licensee, it does not follow that such opinion should be excluded from the air. . . . *Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views . . . but by making the microphone available, for the presentation of contrary views . . . .*" *Id.*, at 1253–1254 (emphasis added).

a variety of other regulatory means that intrude far less drastically upon the "journalistic freedom" of noncommercial broadcasters. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S., at 110. The requirements of the FCC's fairness doctrine, for instance, which apply to commercial and noncommercial stations alike, ensure that such editorializing would maintain a reasonably balanced and fair presentation of controversial issues. Thus, even if the management of a noncommercial educational station were inclined to seek to further only its own partisan views when editorializing, it simply could not do so. Indeed, in considering the constitutionality of the FCC's fairness doctrine, the Court in *Red Lion* considered precisely the same justification invoked by the Government today in support of § 399: that without some requirement of fairness and balance, "station owners . . . would have unfettered power . . . to communicate only their own views on public issues . . . and to permit on the air only those with whom they agreed." 395 U. S., at 392. The solution to this problem offered by § 399, however, is precisely the opposite of the remedy prescribed by the FCC and endorsed by the Court in *Red Lion*. Rather than requiring noncommercial broadcasters who express editorial opinions on controversial subjects to permit *more speech* on such subjects to ensure that the public's First Amendment interest in receiving a balanced account of the issue is met, § 399 simply silences all editorial speech by such broadcasters. Since the breadth of § 399 extends so far beyond what is necessary to accomplish the goals identified by the Government, it fails to satisfy the First Amendment standards that we have applied in this area.

We therefore hold that even if some of the hazards at which § 399 was aimed are sufficiently substantial, the restriction is not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgment of speech worked by the provision's broad ban on editorializing. The statute is not narrowly tailored to address any of the Government's suggested goals. Moreover, the public's "paramount right" to be fully and broadly informed on matters of public importance through the medium of noncommercial educational broadcasting is not well served by the restriction, for its effect is plainly to diminish rather than augment "the volume and quality of coverage" of controversial issues. *Red Lion*, 395 U. S., at 393. Nor do we see any reason to deny noncommercial broadcasters the right to address matters of public concern on the basis of merely speculative fears of adverse public or governmental reactions to such speech.

## IV

Although the Government did not present the argument in any form to the District Court,[26] it now seeks belatedly to justify § 399 on the basis of Congress' spending power. Relying upon our recent decision in *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), the Government argues that by prohibiting noncommercial educational stations that receive CPB grants from editorializing, Congress has, in the proper exercise of its spending power, simply determined that it "will not subsidize public broadcasting station editorials." Brief for Appellant 42. In *Taxation With Representation*, the Court found that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, however, we explained that such organizations remained free "to receive [tax-]deductible contributions to support nonlobbying activit[ies]." 461 U. S., at 545. Thus, a charitable organization could create, under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3), an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and, at the same time, establish, under § 501(c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U. S., at 544; see also *id.*, at 552–553 (BLACKMUN, J., concurring). Given that statutory alternative, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity; [it] has simply chosen not to pay for TWR's lobbying." *Id.*, at 546.

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[26] See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment (July 22, 1981); Defendant's Supplemental Memorandum on Amendment of Section 399 (Sept. 15, 1981); Defendant's Memorandum in Support of Its Motion to Dismiss the Second Amended Complaint (Oct. 13, 1981).

In this case, however, unlike the situation faced by the charitable organization in *Taxation With Representation*, a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.

Of course, if Congress were to adopt a revised version of § 399 that permitted noncommercial educational broadcasting stations to establish "affiliate" organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation*. Under such a statute, public broadcasting stations would be free, in the same way that the charitable organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities. Cf. *id.*, at 544. But in the absence of such authority, we must reject the Government's contention that our decision in *Taxation With Representation* is controlling here.[27]

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[27] JUSTICE REHNQUIST's effort to prop up his position by relying on our decisions upholding certain provisions of the Hatch Act, 5 U. S. C. § 7324 *et seq.*, only reveals his misunderstanding of what is at issue in *this* case. For example, in both *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947), and *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973), the Court has upheld § 9(a) of the Hatch Act—a provision that differs from § 399 in three fundamental respects: first, the statute only prohibits Government employees from "active participation in political management and political campaigns," and, accordingly, "[e]xpressions, public or private, on public affairs, personalities and matters of public interest" are not proscribed, *id.*, at 556; second, the constitutionality of that restriction is grounded in the Government's substantial and important interest in ensuring effective job performance by its own employees, *id.*, at 564–565; and, finally, these restrictions evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government, *id.*, at 557–563. Here, by contrast, the editorializing ban in § 399 directly suppresses not only political endorsements but all editorial expression on matters of public importance; it applies to independent, nongovernmental entities rather than to the Government's own employees; and, it is not grounded in any prior governmental experience with less restrictive means.

More importantly, in neither of those cases did the Court even consider that the restrictions could be justified simply because these employees were receiving Government funds, nor did it find that a lesser degree of judicial scrutiny was required simply because Government funds were involved.

JUSTICE REHNQUIST's reliance upon *Oklahoma* v. *CSC*, 330 U. S. 127 (1947), see *post*, at 405–406, is also misplaced. There, a principal issue addressed by the Court was Oklahoma's claim that § 12 of the Hatch Act invaded the State's sovereignty in violation of the Tenth Amendment, because it authorized the Civil Service Commission to withhold federal funds from States whose officers violated the Act. As the Court noted, "[t]he coercive effect of the authorization to withhold sums allocated to a state is relied upon as an interference with the reserved powers of the state." *Id.*, at 142. After citing *Mitchell*, *supra*, for the proposition that the Act did not impermissibly interfere with an employee's freedom of expression in political matters, 330 U. S., at 142, the Court explained: "While the United

## V

In conclusion, we emphasize that our disposition of this case rests upon a narrow proposition. We do not hold that the Congress or the FCC is without power to regulate the content, timing, or character of speech by noncommercial educational broadcasting stations. Rather, we hold only that the specific interests sought to be advanced by § 399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects. Accordingly, the judgment of the District Court is

*Affirmed.*

JUSTICE WHITE: Believing that the editorializing and candidate endorsement proscription stand or fall together and being confident that Congress may condition use of its funds on abstaining from political endorsements, I join JUSTICE REHNQUIST's dissenting opinion.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the Government appears as the "Big Bad Wolf," and appellee Pacifica as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red

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States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed. *The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case.*" *Id.*, at 143 (emphasis added). Thus, it was only in the context of rejecting Oklahoma's Tenth Amendment claim that the Court used the language cited by the dissent. Just as in *Mitchell*, and *Letter Carriers*, therefore, the Court never intimated in *Oklahoma* v. *CSC* that the mere presence of Government funds was a sufficient reason to uphold the Hatch Act's restrictions on employee freedoms on the basis of relaxed First Amendment standards.

Riding Hood to take to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions. Congress in enacting § 399 of the Public Broadcasting Act, 47 U. S. C. § 399, has simply determined that public funds shall not be used to subsidize noncommercial, educational broadcasting stations which engage in "editorializing" or which support or oppose any political candidate. I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public moneys in that manner. Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles; Pacifica, well aware of § 399's condition on its receipt of public money, nonetheless accepted the public money and now seeks to avoid the conditions which Congress legitimately has attached to receipt of that funding.

While noncommercial, educational broadcasting has a long history in this country, its success was spotty at best until the Federal Government came to its assistance some 45 years ago. Beginning in the late 1930's, the Federal Communications Commission (FCC) reserved certain frequencies, first for educational radio, 47 CFR §§ 4.131–4.133 (1939), and then for educational television, *Television Assignments*, 41 F. C. C. 148 (1952). But even with that assistance, by 1962 there were only 50 educational television stations on the air, and two-thirds of the population had no access to educational television. S. Rep. No. 67, 87th Cong., 1st Sess., 3 (1961). In that year Congress passed the Educational Television Act of 1962, Pub. L. 87–447, 76 Stat. 64, which appropriated $32 million over a period of five years to aid the construction of educational stations, and by 1967, 126 such stations were operating.

Congress' vision was that public broadcasting would be a forum for the educational, cultural, and public affairs broadcasting which commercial stations had been unable or unwilling to furnish. In order to further that vision, in 1967 Congress passed the Public Broadcasting Act of 1967, Pub. L. 90–129, 81 Stat. 365, 47 U. S. C. § 390 *et seq.*, of which § 399 is a part, which created the Corporation for Public Broadcasting (CPB), a nonprofit, Government-chartered corporation governed by a Board of Directors appointed by the President. Although Congress could have chosen to create a federally owned broadcasting network, instead it chose a Government funding program whereby CPB would make grants to stations owned by others, fund the production of programs, and assist in the establishment and development of interconnection systems.

Congress' intent was that CPB's subsidies would ensure that "programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." 47 U. S. C. § 396(g)(1)(A). Understandably Congress did not leave its creature CPB free to roam at large in the broadcasting world, but instead imposed certain restrictions, in keeping with Congress' purposes in passing the Act, on CPB's authorization to grant funds. For example, Congress required that stations receiving CPB grants be government entities or nonprofit organizations, 47 U. S. C. §§ 397(6), (7), and it prohibited them from selling air time for any purpose whatever—including selling time for political or public affairs presentations. §§ 397(7), 399a; see 47 CFR §§ 73.503(d), 73.621(e) (1983). Furthermore, in order to prevent recipient stations from serving as outlets for the political and ideological views of station owners and managers, Congress also insisted in § 399 that subsidized educational stations not engage in editorializing or endorsing or opposing political candidates.

The Court's three-paragraph discussion of why § 399, repeatedly reexamined and retained by Congress, violates the First Amendment is to me utterly unpersuasive. Congress has rationally determined that the bulk of the taxpayers whose moneys provide the funds for grants by the CPB would prefer not to see the management of local educational stations promulgate its own private views on the air at taxpayer expense. Accordingly Congress simply has decided not to subsidize stations which engage in that activity.

Last Term, in *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), we upheld a provision of the Internal Revenue Code which deprives an otherwise eligible organization of its tax-exempt status and its right to receive tax-deductible contributions if it engages in lobbying. We squarely rejected the contention that Congress' decision not to subsidize lobbying violates the First Amendment, even though we recognized that the right to lobby is constitutionally protected. In so holding we reiterated that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.*, at 549. We also rejected the notion that, because Congress chooses to subsidize some speech but not other speech, its exercise of its spending powers is subject to strict judicial scrutiny. *Id.*, at 547–548.

Relying primarily on the reasoning of the concurrence rather than of the majority opinion in *Taxation with Representation*, the Court today seeks to avoid the thrust of that opinion by pointing out that a public broadcasting station is barred from editorializing with its nonfederal funds even though it may receive only a minor fraction of its income from CPB grants. The Court reasons that § 399 does not operate simply to restrict the use of federal funds to purposes defined by Congress; instead, it goes further by prohibiting any station that receives "only 1% of its overall income from CPB grants" from using "even wholly private funds to finance its editorial activity." *Ante*, at 400.

But to me there is no distinction between § 399 and the statute which we upheld in *Oklahoma* v. *CSC*, 330 U. S. 127 (1947). Section 12(a) of the Hatch Act totally prohibits any local or state employee who is employed in any activity which receives partial or total financing from the United States from taking part in any political activities. One might just as readily denounce such congressional action as prohibiting employees of a state or local government receiving even a minor fraction of that government's income from federal assistance from exercising their First Amendment right to speak. But not surprisingly this Court upheld the Hatch Act provision in *Oklahoma* v. *CSC*, *supra*, succinctly stating:

> "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." *Id.*, at 143.*

See also *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947) (rejecting a First Amendment attack on the Hatch Act provisions applicable to federal employees).

The Court seems to believe that Congress actually subsidizes editorializing only if a station uses federal money specifically to cover the expenses that the Court believes can be isolated as editorializing expenses. But to me the Court's approach ignores economic reality. CPB's unrestricted grants are used for salaries, training, equipment, promotion, etc.—financial expenditures which benefit all aspects of a station's programming, including management's editorials.

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*The Court takes pains to show that the argument rejected in *Oklahoma* v. *CSC* was a Tenth Amendment argument. *Ante*, at 401–402, n. 27. Without belaboring the point, in my view a fair reading of the opinion is that the Court used the quoted language in that case to refer to a First Amendment argument similar to this one, as well as to a Tenth Amendment argument.

Given the impossibility of compartmentalizing programming expenses in any meaningful way, it seems clear to me that the only effective means for preventing the use of public moneys to subsidize the airing of management's views is for Congress to ban a subsidized station from all on-the-air editorializing. Under the Court's view, if Congress decided to withhold a 100% subsidy from a station which editorializes, that decision would be constitutional under the principle affirmed in our *Taxation With Representation* decision. Surely on these facts, the distinction between the Government's power to withhold a 100% subsidy, on the one hand, and the 20–30% subsidy involved here, 547 F. Supp. 379, 385 (CD Cal. 1982), on the other hand, is simply trivialization.

This is not to say that the Government may attach *any* condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily "'"aimed at the suppression of dangerous ideas."'" *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959), quoting *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958), in turn quoting *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402 (1950). In this case Congress' prohibition is directly related to its purpose in providing subsidies for public broadcasting, and it is plainly rational for Congress to have determined that taxpayer moneys should not be used to subsidize management's views or to pay for management's exercise of partisan politics. Indeed, it is entirely rational for Congress to have wished to avoid the appearance of Government sponsorship of a particular view or a particular political candidate. Furthermore, Congress' prohibition is strictly neutral. In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent. Nor has it prevented public stations from airing programs, documentaries, interviews, etc. dealing with controversial subjects, so long as management itself does not expressly endorse a particular viewpoint. And Congress has not prevented station management from communicating its own views on those subjects through any medium other than subsidized public broadcasting.

For the foregoing reasons I find this case entirely different from the so-called "unconstitutional condition" cases, wherein the Court has stated that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). In those cases the suppressed speech was not content-neutral in the same sense as here, and in those cases, there is at best only a strained argument that the legislative purpose of the condition imposed was to avoid *subsidizing* the prohibited speech. *Speiser* v. *Randall*, *supra*, is illustrative of the difference. In that case California's decision to deny its property tax exemption to veterans who would not declare that they would not work to overthrow the government was plainly directed at suppressing what California regarded as speech of a dangerous content. And the condition imposed was so unrelated to the benefit to be conferred that it is difficult to argue that California's property tax exemption actually subsidized the dangerous speech.

Here, in my view, Congress has rationally concluded that the bulk of taxpayers whose moneys provide the funds for grants by the CPB would prefer not to see the management of public stations engage in editorializing or the endorsing or opposing of political candidates. Because Congress' decision to enact § 399 is a rational exercise of its spending powers and strictly neutral, I would hold that nothing in the First Amendment makes it unconstitutional. Accordingly, I would reverse the judgment of the District Court.

JUSTICE STEVENS, dissenting.

The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of Government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolf Hitler over Radio Berlin to appreciate the importance of that concern.

As JUSTICE WHITE correctly notes, the statutory prohibitions against editorializing and candidate endorsements rest on the same foundation. In my opinion that foundation is far stronger than merely "a rational basis" and it is not weakened by the fact that it is buttressed by other provisions that are also designed to avoid the insidious evils of government propaganda favoring particular points of view. The quality of the interest in maintaining government neutrality in the free market of ideas—of avoiding subtle forms of censorship and propaganda—outweigh the impact on expression that results from this statute. Indeed, by simply terminating or reducing funding, Congress could curtail much more expression with no risk whatever of a constitutional transgression.

In order to explain my assessment of the case, it is necessary first to supplement the majority's description of the impact of the statute on free expression and then to comment on the justification for that impact.

## I

The relevant facts may be briefly stated. Appellee League of Women Voters of California, a nonprofit organization, wants to enlist the "editorial support" of educational broadcasters in support of its causes. App. 8. Appellee Henry Waxman, a regular listener and viewer of educational stations, desires to hear the "editorial opinions" of educational stations. *Id.*, at 9. Appellee Pacifica, a nonprofit educational corporation which operates five educational radio stations—the broadcasts from which reach 20 percent of the Nation's population—wants to "broadcast its views on various important public issues, and . . . clearly label those views as being editorials broadcast on behalf of the Pacifica management." *Id.*, at 9–10.

In short, Pacifica wants to broadcast its views to Waxman via its radio stations; Waxman wants to listen to those views on his radio; and the League of Women Voters wants a chance to convince Pacifica to take positions its members favor in its radio broadcasts.

All of these wants could be realized but for the fact that Pacifica receives public funds to finance its broadcasts. Because the Government subsidizes its broadcasts, a federal statute prohibits Pacifica from broadcasting its views—labeled as such—via the radio stations it operates. That statute now provides:

> "No noncommercial educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office." 47 U. S. C. § 399.[1]

Although appellees originally challenged the validity of the entire statute, in their amended complaint they limited their attack to the prohibition against editorializing.[2] In its analysis of the case, the Court assumes that the ban on political endorsements is severable from the first section and that it may be constitutional.[3] In view of the fact that the major

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[1] As originally enacted in 1967, the statute provided:

"No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." Pub. L. 90–129, Title II, § 201(8), 81 Stat. 368.

[2] Appellees' abandonment of their attack on the ban on political endorsements merits some comment. At one level it is perplexing, given that we have stated that such political expression is at the very core of the First Amendment's protection, see, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45 (1982); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971), and given

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that Pacifica cannot escape the ban on political endorsements simply by declining to accept Government funds. Viewed solely from the perspective of the First Amendment interests at stake, therefore, it would appear that the ban on candidate endorsements is more suspect than the ban on editorializing.

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), we expressly recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . ." *Id.*, at 270. Appellee Pacifica, which originally asserted a desire to endorse political candidates, apparently has now decided that it does not want to engage in a "wide-open" debate on public issues—it no longer asserts the right to make "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" over its radio stations which are, in fact, funded by Government officials.

In any event, if these particular litigants abandoned their attack on the seemingly more suspect political endorsement ban for tactical reasons, that fact is an indication of the strength of the same basic governmental interest which forms the foundation of the provision which they continue to challenge.

[3] The Court actually raises the wrong severability issue. The serious question in this regard is whether the entire public funding scheme is severable from the prohibition on editorializing and political endorsements. The legislative history of the statute indicates the strength of the congressional aversion to these practices. The basic notion of providing Government subsidies to these domestic organs for the dissemination of information—"educational" stations—was viewed as extremely troubling. The line between education and indoctrination is a subtle one, and it is one Congress did not want these publicly funded stations to cross. The fact that the House Committee Report stated in passing that the provision was added out of "an abundance of caution," merely shows that Congress deemed an abundance of caution necessary. The majority may view the congressional concerns—potential governmental censorship, giving louder voices to a privileged few station owners, and the use of taxpayer funds to subsidize expression of viewpoints with which the taxpayers may not agree—as insufficiently weighty to justify the statute, but Congress clearly thought they were weighty enough.

difference between the ban on political endorsements is based on the content of the speech, it is apparent that the entire rationale of the Court's opinion rests on the premise that it may be permissible to predicate a statutory restriction on candidate endorsements on the difference between the content of that kind of speech and the content of other expressions of editorial opinion.

The Court does not tell us whether speech that endorses political candidates is more or less worthy of protection than other forms of editorializing, but it does iterate and reiterate the point that "the expression of editorial opinion" is a special kind of communication that "is entitled to the most exacting degree of First Amendment protection." *Ante*, at 375–376; see also *ante*, at 380 n. 13, 381, 382, 383, and 384.[4]

Neither the fact that the statute regulates only one kind of speech, nor the fact that editorial opinion has traditionally been an important kind of speech, is sufficient to identify the character or the significance of the statute's impact on speech. Three additional points are relevant. First, the statute does not prohibit Pacifica from expressing its opinion through any avenue except the radio stations for which it receives federal financial support. It eliminates the subsidized channel of communication as a forum for Pacifica itself, and thereby deprives Pacifica of an advantage it would otherwise have over other speakers, but it does not exclude Pacifica from the marketplace for ideas. Second, the statute does not curtail the expression of opinion by individual commentators who participate in Pacifica's programs. The only comment that is prohibited is a statement that Pacifica agrees or disagrees with the opinions that others may express on its programs. Third, and of greatest significance for me, the statutory restriction is completely neutral in its operation—it prohibits all editorials without any distinction being drawn concerning the subject matter or the point of view that might be expressed.[5]

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[4] Thus, once again the Court embraces the obvious proposition that some speech is more worthy of protection than other speech—that the right to express editorial opinion may be worth fighting to preserve even though the right to hear less worthy speech may not—a proposition that several Members of today's majority could only interpret "as an aberration" in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 87 (1976) (dissenting opinion) ("The fact that the 'offensive' speech here may not address 'important' topics—'ideas of social and political significance,' in the Court's terminology, [427 U. S., at 61]—does not mean that it is less worthy of constitutional protection").

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[5] Section 399's ban on editorializing is a content-based restriction on speech, but not in the sense that the majority implies. The majority speaks of "editorial opinion" as if it were some sort of special species of opinion, limited to issues of public importance. See, *e. g.*, *ante*, at 375–376. The majority confuses the typical content of editorials with the meaning of editorial itself. An editorial is, of course, a statement of the *management's* opinion on any topic imaginable. The Court asserts that what the statute "forecloses is the expression of editorial opinion on 'controversial issues of public importance.'" *Ante*, at 381. The statute is not so limited. The content which is prohibited is that the station is not permitted to state its opinion with respect to any matter. In short, it may not be an on-the-air advocate if it accepts Government funds for its broadcasts. The prohibition on editorializing is not directed at any particular message a station might wish to convey, cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 96–97 (1977); see generally *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring). Unlike the Court, I am not troubled by the fact that the stations are allowed to make "daily announcements of the station's program schedule or over-the-air appeals for contributions from listeners," *ante*, at 383, for it is quite plain that this statute is not directed at curtailing expression of particular points of view on controversial issues; it is designed to assure to the extent possible that the station does not become a vehicle for Government propaganda.

Paradoxically, § 399 is later attacked by the majority as essentially being underinclusive because it does not prohibit "controversial" national programming that is often aired with substantial federal funding. Here the Court recognizes that the ban imposed by § 399 "is plainly not directed at the potentially controversial content of such programs," *ante*, at 391, which only demonstrates that it is not directed at the substance of communication at all. Next, § 399's ban on editorializing is attacked by the majority on overinclusive grounds—because it is content-neutral—since it prohibits a "potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidacies, or elections." *Ante*, at 393. Hence, while earlier the majority attacked § 399 as being

## II

The statute does not violate the fundamental principle that the citizen's right to speak may not be conditioned upon the sovereign's agreement with what the speaker intends to say.[6] On the contrary, the statute was enacted in order to protect that very principle—to avoid the risk that some speakers will be rewarded or penalized for saying things that appeal to—or are offensive to—the sovereign.[7] The interests the statute

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content-based, it is now attacked as being noncontent-based, applying to expressions of opinion—such as "urging improvements in a town's parks or museums," *ibid.*—which does not pose, in the Court's view at least, a realistic danger of governmental interference because of its content.

[6] "The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65, 72 (1983); *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 535–536 (1980); *Carey* v. *Brown*, 447 U. S. 455, 462–463 (1980); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63–65, 67–68 (1976) (plurality opinion); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972)." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984).

[7] It is ironic indeed that the majority states that it must be particularly wary in assessing § 399 "to determine whether it reflects an impermissible attempt 'to allow a government [to] control . . . the search for political truth'", *ante*, at 384 (citation omitted), given that the very object of § 399 is to prevent the Government from controlling the search for political truth. Indeed, the Court recognizes that when Congress decided to provide financial support to educational stations, "all concerned agreed that this step posed some risk that these traditionally independent stations might be pressured into becoming forums devoted solely to programming and views that were acceptable to the Federal Government." *Ante*, at 386.

Moreover, the statute will also protect the listener's interest in not having his tax payments used to finance the advocacy of causes he opposes. The majority gives extremely short shrift to the Government's interest in minimizing the use of taxpayer moneys to promote private views with which the taxpayers may disagree. The Court briefly observes that the taxpayers do not have a constitutionally protected right to enjoin such expenditures and then leaps to the conclusion that given the fact the funding scheme itself is not unconstitutional, this interest cannot be used to is designed to protect are interests that underlie the First Amendment itself.

In my judgment the interest in keeping the Federal Government out of the propaganda arena is of overriding importance. That interest is of special importance in the field of electronic communication, not only because that medium is so powerful and persuasive, but also because it is the one form of communication that is licensed by the Federal Government.[8] When the Government already has great potential

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support the statute at issue here. *Ante*, at 385, n. 16. The conclusion manifestly does not follow from the premise, and this interest is plainly legitimate and significant.

[8] We have consistently adhered to the following guiding principles applicable to First Amendment claims in the area of broadcasting, and they bear repeating at some length:

"Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . .

". . . No one has a First Amendment right to a license or to monopolize a radio frequency . . . .

"By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

"[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive . . . ideas . . . which is crucial here." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 388–390 (1969).

power over the electronic media, it is surely legitimate to enact statutory safeguards to make sure that it does not cross the threshold that separates neutral regulation from the subsidy of partisan opinion.

The Court does not question the validity of the basic interests served by § 399. See *ante*, at 386. Instead, it suggests that the statute does not substantially serve those interests because the Public Broadcasting Act operates in many other respects to insulate local stations from governmental interference. See *ante*, at 388–390. In my view, that is an indication of nothing more than the strength of the governmental interest involved here—Congress enacted many safeguards because the evil to be avoided was so grave. Organs of official propaganda are antithetical to this Nation's heritage, and Congress understandably acted with great caution in this area.[9] It is no answer to say that the other statutory provisions "substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern." *Ante*, at 390. The other safeguards protect the stations from interference with judgments that they will necessarily make in selecting programming, but those judgments are relatively amorphous. No safeguard is foolproof; and the fact that funds are dispensed according to largely "objective" criteria certainly is no guarantee. Individuals must always make judgments in allocating funds, and pressure can be exerted in subtle ways as well as through outright fund-cutoffs.

Members of Congress, not members of the Judiciary, live in the world of politics. When they conclude that there is a real danger of political considerations influencing the dispensing of this money and that this provision is necessary to insulate grantees from political pressures in addition to the other safeguards, that judgment is entitled to our respect.

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[9] Cf. 22 U. S. C. § 1461 (prohibiting the International Communication Agency—successor to the United States Information Agency—from disseminating information in the United States).

The magnitude of the present danger that the statute is designed to avoid is admittedly a matter about which reasonable judges may disagree.[10] Moreover, I would agree that the risk would be greater if other statutory safeguards were removed. It remains true, however, that Congress has the power to prevent the use of public funds to subsidize the expression of partisan points of view, or to suppress the propagation of dissenting opinions. No matter how great or how small the immediate risk may be, there surely is more than a theoretical possibility that future grantees might be influenced by the ever present tie of the political purse strings, even if those strings are never actually pulled. "[O]ne who knows that he may dissent knows also that he somehow consents when he does not dissent." H. Arendt, Crises of the Republic 88 (1972), citing 1 A. de Tocqueville, Democracy in America 419 (1945).[11]

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[10] The majority argues that the Government's concededly substantial interest in ensuring that audiences of educational stations will not perceive the station to be a Government propaganda organ can be fully satisfied by requiring such stations to broadcast a disclaimer each time they editorialize stating that the editorial "does not in any way represent the views of the Federal Government . . . ." *Ante*, at 395. This solution would be laughable were it not so Orwellian: the answer to the fact that there is a real danger that the editorials are really Government propaganda is for the Government to require the station to tell the audience that it is not propaganda at all!

[11] The "fairness doctrine" is no answer to the concern that Government-funded organs of mass communication will, overall, take a pro-Government slant in editorializing and thereby create a distortion in the marketplace of ideas. First, the "fairness doctrine" is itself enforced by the Government. Second, that doctrine does not guarantee other speakers access to the microphone if they disagree with editorial opinion expressed by the station on public policy issues. No other voice need be heard if the Government determines that the station's editorial "fairly" presented the substance of "the" opposing view. Moreover, as appellees argue, editorials from an institution which the public may hold in high regard may carry added weight in the marketplace of ideas. See Brief for Appellees 15. That fact, however, magnifies the evil sought to be avoided, for the danger is that pro-Government views that are not actually shared by that institution will be parroted to curry favor with its benefactor.

## III

The Court describes the scope of § 399's ban as being "defined solely on the basis of the content of the suppressed speech," *ante*, at 383, and analogizes this case to the regulation of speech we condemned in *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530 (1980). This description reveals how the Court manipulates labels without perceiving the critical differences behind the two cases.

In *Consolidated Edison* the class of speakers that was affected by New York's prohibition consisted of regulated public utilities that had been expressing their opinion on the issue of nuclear power by means of written statements inserted in their customers' monthly bills. Although the scope of the prohibition was phrased in general terms and applied to a selected group of speakers, it was obviously directed at spokesmen for a particular point of view. The justification for the restriction was phrased in terms of the potential offensiveness of the utilities' messages to their audiences. It was a classic case of a viewpoint-based prohibition.

In this case, however, although the regulation applies only to a defined class of noncommercial broadcast licensees, it is common ground that these licensees represent heterogenous points of view.[12] There is simply no sensible basis for considering this regulation a viewpoint restriction—or, to use the Court's favorite phrase, to condemn it as "content-based"—because it applies equally to station owners of all shades of opinion. Moreover, the justification for the prohibition is not based on the "offensiveness" of the messages in the sense that that term was used in *Consolidated Edison*. Here, it is true that taxpayers might find it offensive if their tax moneys were being used to subsidize the expression of editorial opinion with which they disagree, but it is the fact of the subsidy—not just the expression of the opinion—that legitimates this justification. Furthermore, and of greater importance, the principal justification for this prohibition is the overriding interest in forestalling the creation of propaganda organs for the Government.

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[12] That does not necessarily mean, however, "that the editorial voices of these stations will prove to be as distinctive, varied, and idiosyncratic as the various communities they represent," *ante*, at 391, given the potential effects of Government funding, see *supra*, at 416–417, and n. 11.

I respectfully dissent.

# BERKEMER, SHERIFF OF FRANKLIN COUNTY, OHIO *v.* McCARTY

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83–710. Argued April 18, 1984—Decided July 2, 1984

After observing respondent's car weaving in and out of a highway lane, an officer of the Ohio State Highway Patrol forced respondent to stop and asked him to get out of the car. Upon noticing that respondent was having difficulty standing, the officer concluded that respondent would be charged with a traffic offense and would not be allowed to leave the scene, but respondent was not told that he would be taken into custody. When respondent could not perform a field sobriety test without falling, the officer asked him if he had been using intoxicants, and he replied that he had consumed two beers and had smoked marihuana a short time before. The officer then formally arrested respondent and drove him to a county jail, where a blood test failed to detect any alcohol in respondent's blood. Questioning was then resumed, and respondent again made incriminating statements, including an admission that he was "barely" under the influence of alcohol. At no point during this sequence was respondent given the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436. Respondent was charged with the misdemeanor under Ohio law of operating a motor vehicle while under the influence of alcohol and/or drugs, and when the state court denied his motion to exclude the various incriminating statements on the asserted ground that their admission into evidence would violate the Fifth Amendment because respondent had not been informed of his constitutional rights prior to his interrogation, he pleaded "no contest" and was convicted. After the conviction was affirmed on appeal by the Franklin County Court of Appeals and the Ohio Supreme Court denied review, respondent filed an action in Federal District Court for habeas corpus relief. The District Court dismissed the petition, but the Court of Appeals reversed, holding that *Miranda* warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated is a felony or a misdemeanor traffic offense, and that respondent's postarrest statements, at least, were inadmissible.

*Held:*

1. A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which

he was arrested. Thus, respondent's statements made at the station house were inadmissible since he was "in custody" at least as of the moment he was formally arrested and instructed to get into the police car, and since he was not informed of his constitutional rights at that time. To create an exception to the *Miranda* rule when the police arrest a person for allegedly committing a misdemeanor traffic offense and then question him without informing him of his constitutional rights would substantially undermine the rule's simplicity and clarity and would introduce doctrinal complexities, particularly with respect to situations where the police, in conducting custodial interrogations, do not know whether the person has committed a misdemeanor or a felony. The purposes of the *Miranda* safeguards as to ensuring that the police do not coerce or trick captive suspects into confessing, relieving the inherently compelling pressures generated by the custodial setting itself, and freeing courts from the task of scrutinizing individual cases to determine, after the fact, whether particular confessions were voluntary, are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies. Pp. 428–435.

2. The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the *Miranda* rule. Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way. Moreover, the typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* and subsequent cases in which *Miranda* has been applied. However, if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*. In this case, the initial stop of respondent's car, by itself, did not render him "in custody," and respondent has failed to demonstrate that, at any time between the stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Although the arresting officer apparently decided as soon as respondent stepped out of his car that he would be taken into custody and charged with a traffic offense, the officer never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the

only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Since respondent was not taken into custody for the purposes of *Miranda* until he was formally arrested, his statements made prior to that point were admissible against him. Pp. 435–442.

3. A determination of whether the improper admission of respondent's postarrest statements constituted "harmless error" will not be made by this Court for the cumulative reasons that (i) the issue was not presented to the Ohio courts or to the federal courts below, (ii) respondent's admissions made at the scene of the traffic stop and the statements he made at the police station were not identical, and (iii) the procedural posture of the case makes the use of harmless-error analysis especially difficult because respondent, while preserving his objection to the denial of his pretrial motion to exclude the evidence, elected not to contest the prosecution's case against him and thus has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. Pp. 442–445.

716 F. 2d 361, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 445.

*Alan C. Travis* argued the cause for petitioner. With him on the briefs was *Stephen Michael Miller*.

*R. William Meeks* argued the cause for respondent. With him on the brief were *Paul D. Cassidy*, *Lawrence Herman*, and *Joel A. Rosenfeld*.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents two related questions: First, does our decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic

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**Anthony J. Celebrezze, Jr.*, Attorney General, and *Richard David Drake*, Assistant Attorney General, filed a brief for the State of Ohio as *amicus curiae* urging reversal.

*Jacob D. Fuchsberg* and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

offense? Second, does the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in *Miranda*?

## I

### A

The parties have stipulated to the essential facts. See App. to Pet. for Cert. A–1. On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed respondent's car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced respondent to stop and asked him to get out of the vehicle. When respondent complied, Williams noticed that he was having difficulty standing. At that point, "Williams concluded that [respondent] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated." *Id.*, at A–2. However, respondent was not told that he would be taken into custody. Williams then asked respondent to perform a field sobriety test, commonly known as a "balancing test." Respondent could not do so without falling.

While still at the scene of the traffic stop, Williams asked respondent whether he had been using intoxicants. Respondent replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." *Ibid.* Respondent's speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed respondent under arrest and transported him in the patrol car to the Franklin County Jail.

At the jail, respondent was given an intoxilyzer test to determine the concentration of alcohol in his blood.[1] The test did not detect any alcohol whatsoever in respondent's system. Williams then resumed questioning respondent in order to obtain information for inclusion in the State Highway Patrol Alcohol Influence Report. Respondent answered affirmatively a question whether he had been drinking. When then asked if he was under the influence of alcohol, he said, "I guess, barely." *Ibid.* Williams next asked respondent to indicate on the form whether the marihuana he had smoked had been treated with any chemicals. In the section of the report headed "Remarks," respondent wrote, "No ang[el] dust or PCP in the pot. Rick McCarty." App. 2.

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[1] For a description of the technology associated with the intoxilyzer test, see *California* v. *Trombetta*, 467 U. S. 479, 481–482 (1984).

At no point in this sequence of events did Williams or anyone else tell respondent that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

## B

Respondent was charged with operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Rev. Code Ann. §4511.19 (Supp. 1983). Under Ohio law, that offense is a first-degree misdemeanor and is punishable by fine or imprisonment for up to six months. §2929.21 (1982). Incarceration for a minimum of three days is mandatory. §4511.99 (Supp. 1983).

Respondent moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, respondent pleaded "no contest" and was found guilty.[2] He was sentenced to 90

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[2] Ohio Rev. Code Ann. §2937.07 (1982) provides, in pertinent part: "If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make [a] finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose or continue for sentence accordingly."

Ohio Rule of Criminal Procedure 12(H) provides: "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial days in jail, 80 of which were suspended, and was fined $300, $100 of which were suspended.

On appeal to the Franklin County Court of Appeals, respondent renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in *Miranda* "is not applicable to misdemeanors," *State* v. *Pyle*, 19 Ohio St. 2d 64, 249 N. E. 2d 826 (1969), cert. denied, 396 U. S. 1007 (1970), the Court of Appeals rejected respondent's argument and affirmed his conviction. *State* v. *McCarty*, No. 80AP–680 (Mar. 10, 1981). The Ohio Supreme Court dismissed respondent's appeal on the ground that it failed to present a "substantial constitutional question." *State* v. *McCarty*, No. 81–710 (July 1, 1981).

Respondent then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio.[3] The District Court dismissed the petition, holding that "*Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense." *McCarty* v. *Herdman*, No. C–2–81–1118 (Dec. 11, 1981).

A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that "*Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense." *McCarty* v. *Herdman*, 716 F. 2d 361, 363 (1983) (emphasis in original). In applying this principle to the facts of the case, the Court of Appeals distinguished between the statements made by respondent before and after his formal arrest.[4] The postarrest statements, the court ruled, were

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court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

[3] On respondent's motion, the state trial court stayed execution of respondent's sentence pending the outcome of his application for a writ of habeas corpus. *State* v. *McCarty*, No. 80–TF–C–123915 (Franklin County Mun. Ct., July 28, 1981).

[4] In differentiating respondent's various admissions, the Court of Appeals accorded no significance to the parties' stipulation that respondent's

plainly inadmissible; because respondent was not warned of his constitutional rights prior to or "[a]t the point that Trooper Williams took [him] to the police station," his ensuing admissions could not be used against him. *Id.*, at 364. The court's treatment of respondent's prearrest statements was less clear. It eschewed a holding that "the mere stopping of a motor vehicle triggers *Miranda*," *ibid.*, but did not expressly rule that the statements made by respondent at the scene of the traffic stop could be used against him. In the penultimate paragraph of its opinion, the court asserted that "[t]he failure to advise [respondent] of his constitutional rights rendered *at least some* of his statements inadmissible," *ibid.* (emphasis added), suggesting that the court was uncertain as to the status of the prearrest confessions.[5] "Because [respondent] was convicted on inadmissible evidence," the court deemed it necessary to vacate his conviction and order the District Court to issue a writ of habeas corpus. *Ibid.*[6] However, the Court of Appeals did not specify which statements, if any, could be used against respondent in a retrial.

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in

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"freedom to leave the scene was terminated" at the moment Trooper Williams formed an intent to arrest respondent. The court reasoned that a "'reasonable man' test," not a subjective standard, should control the determination of when a suspect is taken into custody for the purposes of *Miranda*. *McCarty* v. *Herdman*, 716 F. 2d, at 362, n. 1 (quoting *Lowe* v. *United States*, 407 F. 2d 1391, 1397 (CA9 1969)).

[5] Judge Wellford, dissenting, observed: "As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest." 716 F. 2d, at 364. The majority neither accepted nor disavowed this interpretation of its ruling.

[6] Judge Wellford's dissent was premised on his view that the incriminating statements made by respondent after he was formally taken into custody were "essentially repetitious" of the statements he made before his arrest. Reasoning that the prearrest statements were admissible, Judge Wellford argued that the trial court's failure to suppress the postarrest statements was "harmless error." *Id.*, at 365.

*Miranda* to interrogations involving minor offenses[7] and to questioning of motorists detained pursuant to traffic stops.[8] 464 U. S. 1038 (1984).

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[7] In *Clay* v. *Riddle*, 541 F. 2d 456 (1976), the Court of Appeals for the Fourth Circuit held that persons arrested for traffic offenses need not be given *Miranda* warnings. *Id.*, at 457. Several state courts have taken similar positions. See *State* v. *Bliss*, 238 A. 2d 848, 850 (Del. 1968); *County of Dade* v. *Callahan*, 259 So. 2d 504, 507 (Fla. App. 1971), cert. denied, 265 So. 2d 50 (Fla. 1972); *State* v. *Gabrielson*, 192 N. W. 2d 792, 796 (Iowa 1971), cert. denied, 409 U. S. 912 (1972); *State* v. *Angelo*, 251 La. 250, 254–255, 203 So. 2d 710, 711–717 (1967); *State* v. *Neal*, 476 S. W. 2d 547, 553 (Mo. 1972); *State* v. *Macuk*, 57 N. J. 1, 15–16, 268 A. 2d 1, 9 (1970). Other state courts have refused to limit in this fashion the reach of *Miranda*. See *Campbell* v. *Superior Court*, 106 Ariz. 542, 552, 479 P. 2d 685, 695 (1971); *Commonwealth* v. *Brennan*, 386 Mass. 772, 775, 438 N. E. 2d 60, 63 (1982); *State* v. *Kinn*, 288 Minn. 31, 35, 178 N. W. 2d 888, 891 (1970); *State* v. *Lawson*, 285 N. C. 320, 327–328, 204 S. E. 2d 843, 848 (1974); *State* v. *Fields*, 294 N. W. 2d 404, 409 (N. D. 1980) (*Miranda* applicable at least to "more serious [traffic] offense[s] such as driving while intoxicated"); *State* v. *Buchholz*, 11 Ohio St. 3d 24, 28, 462 N. E. 2d 1222, 1226 (1984) (overruling *State* v. *Pyle*, 19 Ohio St. 2d 64, 249 N. E. 2d 826 (1969), cert. denied, 396 U. S. 1007 (1970), and holding that "*Miranda* warnings must be given prior to any custodial interrogation regardless of whether the individual is suspected of committing a felony or misdemeanor"); *State* v. *Roberti*, 293 Ore. 59, 644 P. 2d 1104, on rehearing, 293 Ore. 236, 646 P. 2d 1341 (1982), cert. pending, No. 82–315; *Commonwealth* v. *Meyer*, 488 Pa. 297, 305–306, 412 A. 2d 517, 521 (1980); *Holman* v. *Cox*, 598 P. 2d 1331, 1333 (Utah 1979); *State* v. *Darnell*, 8 Wash. App. 627, 628, 508 P. 2d 613, 615, cert. denied, 414 U. S. 1112 (1973).

[8] The lower courts have dealt with the problem of roadside questioning in a wide variety of ways. For a spectrum of positions, see *State* v. *Tellez*, 6 Ariz. App. 251, 256, 431 P. 2d 691, 696 (1967) (*Miranda* warnings must be given as soon as the policeman has "reasonable grounds" to believe the detained motorist has committed an offense); *Newberry* v. *State*, 552 S. W. 2d 457, 461 (Tex. Crim. App. 1977) (*Miranda* applies when there is probable cause to arrest the driver and the policeman "consider[s the driver] to be in custody and would not . . . let him leave"); *State* v. *Roberti*, 293 Ore., at 236, 646 P. 2d, at 1341 (*Miranda* applies as soon as the officer forms an intention to arrest the motorist); *People* v. *Ramirez*, 199 Colo. 367, 372, n. 5, 609 P. 2d 616, 618, n. 5 (1980) (en banc); *State* v. *Darnell*, *supra*, at 629–630, 508 P. 2d, at 615 (driver is "in custody" for *Miranda* purposes at

## II

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." It is settled that this provision governs state as well as federal criminal proceedings. *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court addressed the problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court held:

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the

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least by the time he is asked to take a field sobriety test); *Commonwealth* v. *Meyer*, *supra*, at 307, 412 A. 2d, at 521–522 (warnings are required as soon as the motorist "reasonably believes his freedom of action is being restricted"); *Lowe* v. *United States*, *supra*, at 1394, 1396; *State* v. *Sykes*, 285 N. C. 202, 205–206, 203 S. E. 2d 849, 850 (1974) (*Miranda* is inapplicable to a traffic stop until the motorist is subjected to formal arrest or the functional equivalent thereof); *Allen* v. *United States*, 129 U. S. App. D. C. 61, 63–64, 390 F. 2d 476, 478–479 ("[S]ome inquiry can be made [without giving *Miranda* warnings] as part of an investigation notwithstanding limited and brief restraints by the police in their effort to screen crimes from relatively routine mishaps"), modified, 131 U. S. App. D. C. 358, 404 F. 2d 1335 (1968); *Holman* v. *Cox*, *supra*, at 1333 (*Miranda* applies upon formal arrest).

following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*, at 444 (footnote omitted).

In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.[9] See, *e. g.*, *Estelle* v. *Smith*, 451 U. S. 454, 466–467 (1981); *Rhode Island* v. *Innis*, 446 U. S. 291, 297–298 (1980) (dictum); *Orozco* v. *Texas*, 394 U. S. 324, 326–327 (1969); *Mathis* v. *United States*, 391 U. S. 1, 3–5 (1968).[10]

Petitioner asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, petitioner argues, his responses should be admissible against him.[11] We cannot agree.

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[9] In *Harris* v. *New York*, 401 U. S. 222 (1971), the Court did sanction use of statements obtained in violation of *Miranda* to impeach the defendant who had made them. The Court was careful to note, however, that the jury had been instructed to consider the statements "only in passing on [the defendant's] credibility and not as evidence of guilt." 401 U. S., at 223.

[10] The one exception to this consistent line of decisions is *New York* v. *Quarles*, 467 U. S. 649 (1984). The Court held in that case that, when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public. Once such information has been obtained, the suspect must be given the standard warnings.

[11] Not all of petitioner's formulations of his proposal are consistent. At some points in his brief and at oral argument, petitioner appeared to advocate an exception solely for drunken-driving charges; at other points, he

One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.

> "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979).

The exception to *Miranda* proposed by petitioner would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, Ohio Rev. Code Ann. §§ 2903.07, 4511.99 (Supp. 1983), while reckless vehicular homicide is a felony, § 2903.06 (Supp. 1983). When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed

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seemed to favor a line between felonies and misdemeanors. Because all of these suggestions suffer from similar infirmities, we do not differentiate among them in the ensuing discussion.

a similar offense [12] or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.[13]

Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters;[14] at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by *Miranda*?[15] The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations.[16] Neither the police nor criminal defendants would benefit from such a development.

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[12] Thus, under Ohio law, while a first offense of negligent vehicular homicide is a misdemeanor, a second offense is a felony. Ohio Rev. Code Ann. § 2903.07 (Supp. 1983). In some jurisdictions, a certain number of convictions for drunken driving triggers a quantum jump in the status of the crime. In South Dakota, for instance, first and second offenses for driving while intoxicated are misdemeanors, but a third offense is a felony. See *Solem* v. *Helm*, 463 U. S. 277, 280, n. 4 (1983).

[13] Cf. *Welsh* v. *Wisconsin*, 466 U. S. 740, 761 (1984) (WHITE, J., dissenting) (observing that officers in the field frequently "have neither the time nor the competence to determine" the severity of the offense for which they are considering arresting a person).

It might be argued that the police would not need to make such guesses; whenever in doubt, they could ensure compliance with the law by giving the full *Miranda* warnings. It cannot be doubted, however, that in some cases a desire to induce a suspect to reveal information he might withhold if informed of his rights would induce the police not to take the cautious course.

[14] See, *e. g.*, *United States* v. *Schultz*, 442 F. Supp. 176 (Md. 1977) (investigation of erratic driving developed into inquiry into narcotics offenses and terminated in a charge of possession of a sawed-off shotgun); *United States* v. *Hatchel*, 329 F. Supp. 113 (Mass. 1971) (investigation into offense of driving the wrong way on a one-way street yielded a charge of possession of a stolen car).

Absent a compelling justification we surely would be unwilling so seriously to impair the simplicity and clarity of the holding of *Miranda*. Neither of the two arguments proffered by petitioner constitutes such a justification. Petitioner first contends that *Miranda* warnings are unnecessary when a suspect is questioned about a misdemeanor traffic offense, because the police have no reason to subject such a suspect to the sort of interrogation that most troubled the Court in *Miranda*. We cannot agree that the dangers of police abuse are so slight in this context. For example, the offense of driving while intoxicated is increasingly regarded in many jurisdictions as a very serious matter.[17] Especially when the intoxicant at issue is a narcotic drug rather than alcohol, the police sometimes have difficulty obtaining evidence of this crime. Under such circumstances, the incentive for the police to try to induce the defendant to incriminate himself may well be substantial. Similar incentives are likely to be present when a person is arrested for a minor offense but the police suspect that a more serious crime may have been committed. See *supra*, at 431–432.

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[15] Cf. *United States* v. *Robinson*, 414 U. S. 218, 221, n. 1 (1973); *id.*, at 238, n. 2 (POWELL, J., concurring) (discussing the problem of determining if a traffic arrest was used as a pretext to legitimate a warrantless search for narcotics).

[16] Cf. *New York* v. *Quarles*, 467 U. S., at 663–664 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

[17] See Brief for State of Ohio as *Amicus Curiae* 18–21 (discussing the "National Epidemic Of Impaired Drivers" and the importance of stemming it); cf. *South Dakota* v. *Neville*, 459 U. S. 553, 558–559 (1983); *Perez* v. *Campbell*, 402 U. S. 637, 657, 672 (1971) (BLACKMUN, J., concurring in part and dissenting in part).

We do not suggest that there is any reason to think improper efforts were made in this case to induce respondent to make damaging admissions. More generally, we have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will. But the same might be said of custodial interrogations of persons arrested for felonies. The purposes of the safeguards prescribed by *Miranda* are to *ensure* that the police do not coerce or trick captive suspects into confessing,[18] to relieve the "'inherently compelling pressures'" generated by the custodial setting itself, "'which work to undermine the individual's will to resist,'"[19] and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.[20] Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

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[18] See *Rhode Island* v. *Innis*, 446 U. S. 291, 299, 301 (1980); *Miranda* v. *Arizona*, 384 U. S. 436, 445–458 (1966).

[19] *Minnesota* v. *Murphy*, 465 U. S. 420, 430 (1984) (quoting *Miranda* v. *Arizona*, *supra*, at 467); see *Estelle* v. *Smith*, 451 U. S. 454, 467 (1981); *United States* v. *Washington*, 431 U. S. 181, 187, n. 5 (1977).

[20] Cf. Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 954–984 (1966) (describing the difficulties encountered by state and federal courts, during the period preceding the decision in *Miranda*, in trying to distinguish voluntary from involuntary confessions).

We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.

Petitioner's second argument is that law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights. Again, we are unpersuaded. The occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare. The police are already well accustomed to giving *Miranda* warnings to persons taken into custody. Adherence to the principle that *all* suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes.

We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*,[21] regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.

The implication of this holding is that the Court of Appeals was correct in ruling that the statements made by respondent at the County Jail were inadmissible. There can be no question that respondent was "in custody" at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of his constitutional rights at that juncture, respondent's subsequent admissions should not have been used against him.

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[21] The parties urge us to answer two questions concerning the precise scope of the safeguards required in circumstances of the sort involved in this case. First, we are asked to consider what a State must do in order to demonstrate that a suspect who might have been under the influence of drugs or alcohol when subjected to custodial interrogation nevertheless understood and freely waived his constitutional rights. Second, it is suggested that we decide whether an indigent suspect has a right, under the Fifth Amendment, to have an attorney appointed to advise him regarding his responses to custodial interrogation when the alleged offense about which he is being questioned is sufficiently minor that he would not have a right, under the Sixth Amendment, to the assistance of appointed counsel at trial, see *Scott* v. *Illinois*, 440 U. S. 367 (1979). We prefer to defer resolution of such matters to a case in which law enforcement authorities have at least attempted to inform the suspect of rights to which he is indisputably entitled.

## III

To assess the admissibility of the self-incriminating statements made by respondent prior to his formal arrest, we are obliged to address a second issue concerning the scope of our decision in *Miranda:* whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." Respondent urges that it should,[22] on the ground that *Miranda* by its terms applies whenever "a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way,*" 384 U. S., at 444 (emphasis added); see *id.*, at 467.[23]

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[22] In his brief, respondent hesitates to embrace this proposition fully, advocating instead a more limited rule under which questioning of a suspect detained pursuant to a traffic stop would be deemed "custodial interrogation" if and only if the police officer had probable cause to arrest the motorist for a crime. See Brief for Respondent 39–40, 46. This ostensibly more modest proposal has little to recommend it. The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions. And, by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the rule proposed by respondent would be extremely difficult to administer. Accordingly, we confine our attention below to respondent's stronger argument: that all traffic stops are subject to the dictates of *Miranda.*

[23] It might be argued that, insofar as the Court of Appeals expressly held inadmissible only the statements made by respondent after his formal arrest, and respondent has not filed a cross-petition, respondent is disentitled at this juncture to assert that *Miranda* warnings must be given to a detained motorist who has not been arrested. See, *e. g., United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 401, n. 2 (1975). However, three considerations, in combination, prompt us to consider the question highlighted by respondent. First, as indicated above, the Court of Appeals' judgment regarding the time at which *Miranda* became applicable is ambiguous; some of the court's statements cast doubt upon the admissibility

Petitioner contends that a holding that every detained motorist must be advised of his rights before being questioned would constitute an unwarranted extension of the *Miranda* doctrine.

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. *E. g.*, Ohio Rev. Code Ann. § 4511.02 (1982).[24] Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.[25] Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'sei-

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of respondent's prearrest statements. See *supra*, at 425–426. Without undue strain, the position taken by respondent before this Court thus might be characterized as an argument in support of the judgment below, which respondent is entitled to make. Second, the relevance of *Miranda* to the questioning of a motorist detained pursuant to a traffic stop is an issue that plainly warrants our attention, and with regard to which the lower courts are in need of guidance. Third and perhaps most importantly, both parties have briefed and argued the question. Under these circumstances, we decline to interpret and apply strictly the rule that we will not address an argument advanced by a respondent that would enlarge his rights under a judgment, unless he has filed a cross-petition for certiorari.

[24] Examples of similar provisions in other States are: Ariz. Rev. Stat. Ann. §§ 28–622, 28–622.01 (1976 and Supp. 1983–1984); Cal. Veh. Code Ann. §§ 2800, 2800.1 (West Supp. 1984); Del. Code Ann., Tit. 21, § 4103 (1979); Fla. Stat. § 316.1935 (Supp. 1984); Ill. Rev. Stat., ch. 95½, ¶ 11–204 (1983); N. Y. Veh. & Traf. Law § 1102 (McKinney Supp. 1983–1984); Nev. Rev. Stat. § 484.348(1) (1983); 75 Pa. Cons. Stat. § 3733(a) (1977); Wash. Rev. Code § 46.61.020 (1983).

[25] Indeed, petitioner frankly admits that "[n]o reasonable person would feel that he was free to ignore the visible and audible signal of a traffic safety enforcement officer . . . . Moreover, it is nothing short of sophistic to state that a motorist ordered by a police officer to step out of his vehicle would reasonabl[y] or prudently believe that he was at liberty to ignore that command." Brief for Petitioner 16–17.

zure' within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979) (citations omitted).

However, we decline to accord talismanic power to the phrase in the *Miranda* opinion emphasized by respondent. Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely," *Miranda* v. *Arizona*, 384 U. S., at 467. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.[26] In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. See *id.*, at 451.[27]

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[26] State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly, see Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 402, n. a (5th ed. 1980), but no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate. For a representative sample of these provisions, see Ariz. Rev. Stat. Ann. §§28-1053, 28-1054 (1976); Ga. Code Ann. §40-13-53 (Supp. 1983); Kan. Stat. Ann. §§8-2105, 8-2106 (1982); Nev. Rev. Stat. §§484.793, 484.795, 484.797, 484.799, 484.805 (1983); Ore. Rev. Stat. §484.353 (1983); S. D. Codified Laws §32-33-2 (Supp. 1983); Tex. Rev. Civ. Stat. Ann., Art. 6701d, §§147, 148 (Vernon 1977); Va. Code

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmo-

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§ 46.1–178 (Supp. 1983). Cf. National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 16–203—16–206 (Supp. 1979) (advocating mandatory release on citation of all drivers except those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom the officer has "reasonable and probable grounds to believe . . . will disregard a written promise to appear in court").

[27] The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself. One of the investigative techniques that *Miranda* was designed to guard against was the use by police of various kinds of trickery—such as "Mutt and Jeff" routines—to elicit confessions from suspects. See 384 U. S., at 448–455. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort. Cf. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and Beyond, 67 Mich. L. Rev. 39, 99 (1968).

sphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself, see 384 U. S., at 445, 491–498, and in the subsequent cases in which we have applied *Miranda.*[28]

In both of these respects, the usual traffic stop is more analogous to a so-called "*Terry* stop," see *Terry* v. *Ohio*, 392 U. S. 1 (1968), than to a formal arrest.[29] Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly[30] in order to "investigate the circumstances that provoke suspicion." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *Ibid.* (quoting *Terry* v. *Ohio*, *supra*, at 29.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him,[31] he must then be released.[32] The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

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[28] See *Orozco* v. *Texas*, 394 U. S. 324, 325 (1969) (suspect arrested and questioned in his bedroom by four police officers); *Mathis* v. *United States*, 391 U. S. 1, 2–3 (1968) (defendant questioned by a Government agent while in jail).

[29] No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

[30] Nothing in this opinion is intended to refine the constraints imposed by the Fourth Amendment on the duration of such detentions. Cf. *Sharpe* v. *United States*, 712 F. 2d 65 (CA4 1983), cert. granted, 467 U. S. 1250 (1984).

[31] Cf. *Adams* v. *Williams*, 407 U. S. 143, 148 (1972).

Respondent contends that to "exempt" traffic stops from the coverage of *Miranda* will open the way to widespread abuse. Policemen will simply delay formally arresting detained motorists, and will subject them to sustained and intimidating interrogation at the scene of their initial detention. Cf. *State* v. *Roberti*, 293 Ore. 59, 95, 644 P. 2d 1104, 1125 (1982) (Linde, J., dissenting) (predicting the emergence of a rule that "a person has not been significantly deprived of freedom of action for *Miranda* purposes as long as he is in his own car, even if it is surrounded by several patrol cars and officers with drawn weapons"), withdrawn on rehearing, 293 Ore. 236, 646 P. 2d 1341 (1982), cert. pending, No. 82–315. The net result, respondent contends, will be a serious threat to the rights that the *Miranda* doctrine is designed to protect.

We are confident that the state of affairs projected by respondent will not come to pass. It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) *(per curiam)*. If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. See *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) *(per curiam)*.

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[32] Cf. *Terry* v. *Ohio*, 392 U. S., at 34 (WHITE, J., concurring).

Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws—by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists—while doing little to protect citizens' Fifth Amendment rights.[33] The second would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.

Turning to the case before us, we find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest.[34] At no point during that interval was respondent informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.[35] Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists.[36] Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

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[33] Contrast the minor burdens on law enforcement and significant protection of citizens' rights effected by our holding that *Miranda* governs custodial interrogation of persons accused of misdemeanor traffic offenses. See *supra*, at 432–434.

[34] Cf. *Commonwealth* v. *Meyer*, 488 Pa., at 301, 307, 412 A. 2d, at 518–519, 522 (driver who was detained for over one-half hour, part of the time in a patrol car, held to have been in custody for the purposes of *Miranda* by the time he was questioned concerning the circumstances of an accident).

We conclude, in short, that respondent was not taken into custody for the purposes of *Miranda* until Williams arrested him. Consequently, the statements respondent made prior to that point were admissible against him.

## IV

We are left with the question of the appropriate remedy. In his brief, petitioner contends that, if we agree with the

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[35] Cf. *Beckwith* v. *United States*, 425 U. S. 341, 346–347 (1976) ("'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning'") (quoting *United States* v. *Caiello*, 420 F. 2d 471, 473 (CA2 1969)); *People* v. *P.*, 21 N. Y. 2d 1, 9–10, 233 N. E. 2d 255, 260 (1967) (an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question").

[36] Cf. *United States* v. *Schultz*, 442 F. Supp., at 180 (suspect who was stopped for erratic driving, subjected to persistent questioning in the

Court of Appeals that respondent's postarrest statements should have been suppressed but conclude that respondent's prearrest statements were admissible, we should reverse the Court of Appeals' judgment on the ground that the state trial court's erroneous refusal to exclude the postarrest admissions constituted "harmless error" within the meaning of *Chapman* v. *California*, 386 U. S. 18 (1967). Relying on *Milton* v. *Wainwright*, 407 U. S. 371 (1972), petitioner argues that the statements made by respondent at the police station "were merely recitations of what respondent had already admitted at the scene of the traffic arrest" and therefore were unnecessary to his conviction. Brief for Petitioner 25. We reject this proposed disposition of the case for three cumulative reasons.

First, the issue of harmless error was not presented to any of the Ohio courts, to the District Court, or to the Court of Appeals.[37] Though, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, see *Carlson* v. *Green*, 446 U. S. 14, 17, n. 2 (1980), we are generally reluctant to do so, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).[38]

Second, the admissions respondent made at the scene of the traffic stop and the statements he made at the police station were not identical. Most importantly, though respondent at the scene admitted having recently drunk beer and smoked marihuana, not until questioned at the station did he

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squad car about drinking alcohol and smoking marihuana, and denied permission to contact his mother held to have been in custody for the purposes of *Miranda* by the time he confessed to possession of a sawed-off shotgun).

[37] Judge Wellford, dissenting in the Court of Appeals, did address the issue of harmless error, see n. 6, *supra*, but without the benefit of briefing by the parties. The majority of the panel of the Court of Appeals did not consider the question.

[38] Nor did petitioner mention harmless error in his petition to this Court. Absent unusual circumstances, cf. n. 23, *supra*, we are chary of considering issues not presented in petitions for certiorari. See this Court's Rule 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court").

acknowledge being under the influence of intoxicants, an essential element of the crime for which he was convicted.[39] This fact assumes significance in view of the failure of the intoxilyzer test to discern any alcohol in his blood.

Third, the case arises in a procedural posture that makes the use of harmless-error analysis especially difficult.[40] This is not a case in which a defendant, after denial of a suppression motion, is given a full trial resulting in his conviction. Rather, after the trial court ruled that all of respondent's self-incriminating statements were admissible, respondent elected not to contest the prosecution's case against him, while preserving his objection to the denial of his pretrial motion.[41] As a result, respondent has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. For example, respondent alleges that, at the time of his arrest, he had an injured back and a limp[42] and that those ailments accounted for his difficulty getting out of the car and performing the balancing test; because he pleaded "no contest," he never had a chance to make that argument to a jury. It is difficult enough, on the basis of a complete record of a trial and the parties' contentions regarding the relative importance of each portion of the evidence presented, to determine whether the erroneous admission of particular material affected the outcome. Without the benefit of such a record in this case, we decline to rule that the trial court's refusal to suppress respondent's postarrest statements "was harmless beyond a reasonable doubt." See *Chapman* v. *California*, 386 U. S., at 24.

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[39] This case is thus not comparable to *Milton* v. *Wainwright*, 407 U. S. 371 (1972), in which a confession presumed to be inadmissible contained no information not already provided by three admissible confessions. See *id.*, at 375–376.

[40] Because we do not rule that the trial court's error was harmless, we need not decide whether harmless-error analysis is even applicable to a case of this sort.

[41] Under Ohio law, respondent had a right to pursue such a course. See n. 2, *supra*.

[42] Indeed, respondent points out that he told Trooper Williams of these ailments at the time of his arrest, and their existence was duly noted in the Alcohol Influence Report. See App. 2.

Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The only question presented by the petition for certiorari reads as follows:

> "Whether law enforcement officers must give '*Miranda* warnings' to individuals arrested for misdemeanor traffic offenses."

In Parts I, II, and IV of its opinion, the Court answers that question in the affirmative and explains why that answer requires that the judgment of the Court of Appeals be affirmed. Part III of the Court's opinion is written for the purpose of discussing the admissibility of statements made by respondent "prior to his formal arrest," see *ante*, at 435. That discussion is not necessary to the disposition of the case, nor necessary to answer the only question presented by the certiorari petition. Indeed, the Court of Appeals quite properly did not pass on the question answered in Part III since it was entirely unnecessary to the judgment in this case. It thus wisely followed the cardinal rule that a court should not pass on a constitutional question in advance of the necessity of deciding it. See, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring).

Lamentably, this Court fails to follow the course of judicial restraint that we have set for the entire federal judiciary. In this case, it appears the reason for reaching out to decide a question not passed upon below and unnecessary to the judgment is that the answer to the question upon which we granted review is so clear under our settled precedents that the majority—its appetite for deciding constitutional questions only whetted—is driven to serve up a more delectable issue to satiate it. I had thought it clear, however, that no matter how interesting or potentially important a determination on a question of constitutional law may be, "broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." *Barr* v. *Matteo*, 355 U. S. 171, 172 (1957) *(per curiam)*. Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is. See *New York* v. *Uplinger*, 467 U. S. 246, 251 (1984) (STEVENS, J., concurring).

Because I remain convinced that the Court should abjure the practice of reaching out to decide cases on the broadest grounds possible, *e. g.*, *United States* v. *Doe*, 465 U. S. 605, 619–620 (1984) (STEVENS, J., concurring in part and dissenting in part); *Grove City College* v. *Bell*, 465 U. S. 555, 579 (1984) (STEVENS, J., concurring in part and concurring in result); *Colorado* v. *Nunez*, 465 U. S. 324, 327–328 (1984) (STEVENS, J., concurring); *United States* v. *Gouveia*, 467 U. S. 180, 193 (1984) (STEVENS, J., concurring in judgment); *Firefighters* v. *Stotts*, 467 U. S. 561, 590–591 (1984) (STEVENS, J., concurring in judgment); see also, *University of California Regents* v. *Bakke*, 438 U. S. 265, 411–412 (1978) (STEVENS, J., concurring in judgment in part and dissenting in part); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 714 (1978) (STEVENS, J., concurring in part); cf. *Snepp* v. *United States*, 444 U. S. 507, 524–525 (1980) (STEVENS, J., dissenting), I do not join Part III of the Court's opinion.

# SPAZIANO *v.* FLORIDA

## CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 83-5596. Argued April 17, 1984—Decided July 2, 1984

At petitioner's trial for first-degree murder, the Florida trial court informed him that it would instruct the jury on lesser included, noncapital offenses, if he would waive the statute of limitations, which had expired as to those offenses. Petitioner refused to waive the statute, and the jury was instructed solely on capital murder. After the jury returned a verdict of guilty of first-degree murder, a sentencing hearing was conducted before the same jury, a majority of which recommended life imprisonment. Under Florida law, the jury's sentencing recommendation in a capital case is only advisory, and the trial court must conduct its own weighing of the aggravating and mitigating circumstances to determine the proper sentence. If a death sentence is imposed, specified written findings are required. In this case, the trial court imposed the death sentence and entered its findings in support thereof. The Florida Supreme Court affirmed the conviction, rejecting petitioner's contention that *Beck* v. *Alabama,* 447 U. S. 625—which held that a statute prohibiting lesser included offense instructions in capital cases was unconstitutional—required reversal because of the trial court's failure to instruct the jury on lesser included offenses absent a waiver of the statute of limitations on those offenses. However, the Florida Supreme Court reversed the death sentence because of the trial judge's consideration of a confidential portion of the presentence investigation report, neither party having received a copy of the confidential portion. On remand, the trial court again imposed the death penalty after a hearing to allow petitioner to present evidence in response to a new presentence investigation report. The Florida Supreme Court affirmed, holding, *inter alia,* that there was no constitutional infirmity in the Florida procedure whereby the judge is allowed to override the jury's recommendation of life imprisonment.

*Held:*

1. On the facts, it was not error for the trial judge to refuse to instruct the jury on lesser included offenses. *Beck* v. *Alabama, supra,* recognized the risk of an unwarranted conviction that is created when the jury is deprived of the "third option" of convicting the defendant of a lesser included offense. Petitioner's general premise that a criminal defendant may not be required to waive a substantive right—here the right to a statute of limitations—as a condition for receiving an otherwise constitu-

tionally fair trial does not apply to petitioner's situation. In *Beck*, the element found to be essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. The defendant has the option of waiving the expired statute of limitations on lesser included offenses in order to have the jury instructed on those offenses, or of asserting the statute of limitations. Pp. 454–457.

2. There is no constitutional requirement that a jury's recommendation of life imprisonment in a capital case be final so as to preclude the trial judge from overriding the jury's recommendation and imposing the death sentence. The fundamental issue in a capital sentencing proceeding is the determination of the appropriate punishment to be imposed on an individual, and the Sixth Amendment does not guarantee a right to a jury determination of that issue. Nothing in the safeguards against arbitrary and discriminatory application of the death penalty necessitated by the qualitative difference of the penalty requires that the sentence be imposed by a jury. And the purposes of the death penalty are not frustrated by, or inconsistent with, a scheme in which imposition of the penalty is determined by a judge. The fact that the majority of jurisdictions with capital sentencing statutes give the life-or-death decision to the jury does not establish that contemporary standards of fairness and decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. Pp. 457–465.

3. The determination that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed also disposes of petitioner's double jeopardy challenge to the jury-override procedure. If the judge is vested with sole responsibility for imposing the penalty, the jury's advice does not become a judgment simply because it comes from the jury. P. 465.

4. Application of the Florida standards allowing a trial court to override a jury's recommendation of a life sentence does not violate the constitutional requirement of reliability in capital sentencing. There is no indication that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. The trial judge here based his decision on the presence of two statutory aggravating circumstances and the absence of any mitigating circumstances. The Florida Supreme Court reviewed petitioner's sentence and concluded that the death pen-

**alty was properly imposed under state law. Whether or not "reasonable people" could differ over the result, there is nothing irrational or arbitrary about the imposition of petitioner's death penalty. Pp. 465–467.**

**433 So. 2d 508, affirmed.**

**BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined; in all but a portion of page 456 in Part II of which WHITE and REHNQUIST, JJ., joined; and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, J., joined, *post*, p. 467. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 467.**

*Craig S. Barnard* argued the cause for petitioner. With him on the brief were *Richard L. Jorandby*, *Richard H. Burr III*, and *Richard B. Greene*.

*Mark C. Menser*, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith*, Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents questions regarding the administration of Florida's capital sentencing statute. In particular, petitioner challenges the trial court's failure to instruct the jury on lesser included offenses of capital murder. He also challenges the court's imposition of a sentence of death when the jury had recommended life. We conclude that on the facts of this case, it was not error for the trial judge to refuse to give the lesser included offense instruction and that there is no constitutional requirement that the jury's recommendation of life be final. We also reject petitioner's argument that, as applied in this case, the Florida standards for overriding a jury's sentencing recommendation are so broad and vague as to violate the constitutional requirement of reliability in capital sentencing.

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***Ramsey Clark*, *Richard W. Ervin*, and *Thomas A. Horkan, Jr.*, filed a brief *pro se* as *amici curiae*.**

## I

Petitioner Joseph Robert Spaziano was indicted and tried for first-degree murder. The indictment was brought two years and one month after the alleged offense. Under the Florida statute of limitations in effect at the time of the alleged offense, August 1973, the limitations period for noncapital offenses was two years. Fla. Stat. § 932.465(2) (1973).[1] There was no statute of limitations for capital offenses, such as first-degree murder. § 932.465(1).

The primary evidence against petitioner was given by a witness who testified that petitioner had taken him to a garbage dump in Seminole County, Fla., where petitioner had pointed out the remains of two women he claimed to have tortured and murdered. Petitioner challenged the sufficiency of the witness' recall and perception because of a substantial drug habit. The witness testified that he had not taken drugs on the day of the visit to the garbage dump, and he had been able to direct the police to the site. See *Spaziano* v. *State*, 393 So. 2d 1119, 1120 (Fla. 1981).

At the close of the evidence, the trial court informed petitioner that it would instruct the jury on the lesser included, noncapital offenses of attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter, if petitioner would waive the statute of limitations as to those offenses. Tr. 751–755. Petitioner refused to waive the statute. The court accordingly instructed the jury solely on capital murder.

The jury deliberated somewhat more than six hours. It reported itself deadlocked, and the trial court gave an additional instruction, encouraging the jurors to resolve their differences and come to a common conclusion.[2] Shortly thereafter, the jury returned a verdict of guilty of first-degree murder.

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[1] Under the current Florida statute, there is no limitation period on capital and life felonies. There are, however, a 4-year limitation period on first-degree felonies, and a 3-year limit on prosecutions for all other felonies. Fla. Stat. § 775.15 (1983). Under Florida law, the statute of limitations in effect at the time of the alleged offense governs. *Florida ex rel. Manucy* v. *Wadsworth*, 293 So. 2d 345, 347 (Fla. 1974).

The trial court then convened a sentencing hearing before the same jury. Arguments were heard from both sides and evidence offered on aggravating and mitigating circumstances. A majority of the jury recommended life imprisonment.[3] In Florida, the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. § 921.141(3) (1983).[4] The trial court concluded that, "notwithstanding the recommendation of the jury, . . . sufficient aggravating circumstances existed to justify and authorize a death sentence[;] . . . the mitigating circumstances were insufficient to outweigh such aggravating circumstances and . . . a sentence of death should be imposed in this case." App. 14. The two aggravating circumstances found by the court were that the homicide was especially heinous and atrocious and that the defendant had been convicted previously of felonies involving the use or threat of violence to the person. The trial court found no mitigating circumstance "except, perhaps, the age [28] of the defendant." *Id.*, at 14–15.

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[2] The court instructed the jury as follows:

"Ladies and gentlemen, it is your duty to agree upon a verdict if you can do so without violating conscientiously held convictions that are based on the evidence or lack of evidence. No juror, from mere pride or opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating a case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and that this case may be disposed of." Tr. 817–818.

This instruction is commonly referred to as an *Allen* or "hammer" charge. See *Allen* v. *United States*, 164 U. S. 492 (1896).

[3] By agreement of the parties, the jury was not polled. Sentencing Tr. 28–29 (Jan. 26, 1976).

[4] The Florida capital sentencing statute in effect at the time of petitioner's trial, January 1976, is not identical to that currently in effect. In 1976, the statute directed the sentencer to determine whether statutory aggravating circumstances were outweighed by statutory mitigating circumstances. See 1972 Fla. Laws, ch. 72–724. The current statute directs the sentencer to determine whether statutory aggravating circumstances are outweighed by any mitigating circumstances. §§ 921.141(2)(b), (3)(b) (1983), as amended by 1979 Fla. Laws, ch. 79–353. There is no suggestion in this case that either the jury or the trial judge was precluded from considering any nonstatutory mitigating evidence. Cf. *Barclay*

On appeal, the Supreme Court of Florida affirmed the conviction but reversed the death sentence. *Spaziano* v. *State*, 393 So. 2d 1119 (1981). In deciding whether to impose the death sentence, the trial judge had considered a confidential portion of the presentence investigation report that contained information about petitioner's previous felony convictions as well as other charges for which petitioner had not been convicted. Neither party had received a copy of that confidential portion. Relying on *Gardner* v. *Florida*, 430 U. S. 349 (1977), the court concluded that it was error for the trial judge to rely on the confidential information in the presentence investigation report without first disclosing the information to petitioner and giving him an opportunity to present evidence in response.

In a memorandum of supplemental authority, petitioner also urged that *Beck* v. *Alabama*, 447 U. S. 625 (1980), required reversal of his conviction because of the trial court's failure to instruct the jury on the lesser included offenses absent a waiver of the statute of limitations on those offenses. The Supreme Court found *Beck* inapposite. *Beck* concerned an express statutory prohibition on instructions for lesser included offenses. The court found nothing in *Beck* requiring

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v. *Florida*, 463 U. S. 939, 947, n. 2 (1983) (STEVENS, J., concurring in judgment).

that the jury determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty. This Court denied certiorari. 454 U. S. 1037 (1981).

On remand, the trial court ordered a new presentence investigation report and scheduled a hearing to allow petitioner to present evidence in response to the report. At the hearing, petitioner offered no evidence. The State presented evidence that petitioner had been convicted previously of forcible carnal knowledge and aggravated battery. Although the State had attempted to introduce evidence of the prior conviction in petitioner's initial sentencing hearing before the jury, the trial judge had excluded the evidence on the ground that the conviction was then on appeal. By the time of the *Gardner* rehearing, the conviction was final and the trial judge agreed that it was a proper consideration. Accordingly, he relied on that conviction in finding the aggravating circumstance that the defendant had been convicted previously of a felony involving the use of violence to the person. The judge also reaffirmed his conclusion that the crime was especially heinous, atrocious, and cruel. He sentenced petitioner to death. App. 25.

The Supreme Court of Florida affirmed. 433 So. 2d 508 (1983). It rejected petitioner's argument that the trial court erred in allowing the State to introduce evidence of a previous conviction not considered in the original sentencing phase. The court noted that the information was in the original presentence investigation report. The only reason it was not considered was that the trial court mistakenly thought that under Florida law it could not be considered, since the conviction was then on appeal.

The Supreme Court also found no constitutional infirmity in the procedure whereby the judge is allowed to override the jury's recommendation of life. The court found no double jeopardy problem with the procedure, because the jury's function is only advisory. The court added its understanding that allowing the jury's recommendation to be binding would violate the requirements of *Furman* v. *Georgia*, 408 U. S. 238 (1972).

Finally, the court found that in this case the evidence suggesting that the death sentence be imposed over the jury's recommendation of life "meets the clear and convincing test to allow override of the jury's recommendation in accordance with . . . *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975)." 433 So. 2d, at 511. One judge dissented, finding "no compelling reason" to override the jury's recommendation of life. *Id.*, at 512.

We granted certiorari, 464 U. S. 1038 (1984), and we now affirm.

## II

We turn first to the trial court's refusal to give an instruction on lesser included offenses. In *Beck* v. *Alabama*, *supra*, the Court recognized the risk of an unwarranted conviction that is created when the jury is deprived of the "third option" of convicting the defendant of a lesser included offense. *Id.*, at 637. See also *Keeble* v. *United States*, 412 U. S. 205, 212–213 (1973). We concluded that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake" and that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [a State] is constitutionally prohibited from withdrawing that option from the jury in a capital case." 447 U. S., at 637–638. The issue here is whether the defendant is entitled to the benefit of both the lesser included offense instruction and an expired period of limitations on those offenses.[5]

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[5] We note that although the Court has not specifically addressed the question presented here, it has assumed that if a defendant is constitutionally entitled to a lesser included offense instruction, the trial court has authority to convict him of the lesser included offense. See *Keeble* v. *United States*, 412 U. S. 205 (1973); *id.*, at 215–217 (Stewart, J., dissenting on the ground that the Court's decision improperly conferred jurisdiction in the federal district court over crimes not enumerated in the Major Crimes Act, 18 U. S. C. §§ 1153, 3242).

Petitioner urges that he should not be required to waive a substantive right—to a statute of limitations defense—in order to receive a constitutionally fair trial. *Beck* made clear that in a capital trial, a lesser included offense instruction is a necessary element of a constitutionally fair trial. Thus, petitioner claims, he is entitled to the benefit of the *Beck* rule regardless of whether the statute of limitations prevents him from actually being punished on a lesser included offense.

We, of course, have no quarrel with petitioner's general premise that a criminal defendant may not be required to waive a substantive right as a condition for receiving an otherwise constitutionally fair trial. We do not agree that the premise fairly applies to petitioner's situation. Petitioner would have us divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result.

The Court in *Beck* recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In *Beck*, the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. *Id.*, at 643. The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence. *Id.*, at 638–643. Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process.

We reaffirm our commitment to the demands of reliability in decisions involving death and to the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions. But we are unwilling to close our eyes to the social cost of petitioner's proposed rule. *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice. Such a rule not only would undermine the public's confidence in the criminal justice system, but it also would do a serious disservice to the goal of rationality on which the *Beck* rule is based.

If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether *Beck* requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

As the Court in *Beck* recognized, the rule regarding a lesser included offense instruction originally developed as an aid to the prosecution. If the State failed to produce sufficient evidence to prove the crime charged, it might still persuade the jury that the defendant was guilty of something. *Id.*, at 633. See also 3 C. Wright, Federal Practice and Procedure § 515, p. 20, n. 2 (2d ed. 1982). Although the *Beck* rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him not only to waive his statute of limitations defense, but also to give the State what he perceives as an advantage—an opportunity to convict him of a lesser offense if it fails to persuade the jury that he is guilty of capital murder. In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so.[6] Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses.

## III

Petitioner's second challenge concerns the trial judge's imposition of a sentence of death after the jury had recommended life imprisonment. Petitioner urges that allowing a judge to override a jury's recommendation of life violates the Eighth Amendment's proscription against "cruel and unusual punishments." Because the jury's verdict of life should be final, petitioner argues, the practice also violates the Fifth

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[6] There is no doubt about petitioner's understanding of the implications of his refusal to waive the statute of limitations. The following colloquy occurred in open court:

"THE COURT: Do you understand that while the statute of limitations has run on the Court submitting to the jury lesser included verdicts representing the charges of second-degree murder and third-degree murder, manslaughter, that you who has the benefit of the statute of limitations can waive that benefit and, of course—and then have the Court submit the case to the jury on the first-degree, second-degree, third-degree and manslaughter.

"If you don't waive the statute of limitations, then the Court would submit to the jury only on the one charge, the main charge, which is murder in the first degree, and the sentencing alternatives are as [defense counsel] stated them. Do you understand that?

"MR. SPAZIANO: Yes, your Honor.

"THE COURT: Are you sure?

"MR. SPAZIANO: I understand what I'm waiving. I was brought here on first-degree murder, and I figure if I'm guilty of this, I should be killed." Tr. 753–754.

Amendment's Double Jeopardy Clause made applicable to the States through the Fourteenth Amendment. See *Benton* v. *Maryland*, 395 U. S. 784, 793–796 (1969). Finally, drawing on this Court's recognition of the value of the jury's role, particularly in a capital proceeding, petitioner urges that the practice violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

Petitioner points out that we need not decide whether jury sentencing in all capital cases is required; this case presents only the question whether, given a jury verdict of life, the judge may override that verdict and impose death. As counsel acknowledged at oral argument, however, his fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury. Tr. of Oral Arg. 16–17. We therefore address that fundamental premise. Before doing so, however, it is useful to clarify what is not at issue here.

Petitioner does not urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). In *Duncan*, the Court found that the right to jury trial guaranteed by the Sixth Amendment is so " 'basic in our system of jurisprudence,' " *id.*, at 149, quoting *In re Oliver*, 333 U. S. 257, 273 (1948), that it is also protected against state action by the Fourteenth Amendment.

This Court, of course, has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence. See *Bullington* v. *Missouri*, 451 U. S. 430, 444 (1981). Because the " 'embarrassment, expense and ordeal' . . . faced by a defendant at the penalty phase of a . . . capital murder trial . . . are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty. *Id.*, at 445, quoting *Green* v. *United States*, 355 U. S. 184, 187 (1957); *Arizona* v.

*Rumsey*, 467 U. S. 203 (1984). The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. The Court's concern in *Bullington* was with the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty. 451 U. S., at 445. There is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. *Arizona* v. *Rumsey*, *supra*. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. See *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion), citing *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937), and *Williams* v. *New York*, 337 U. S. 241, 247–249 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

Nor does petitioner urge that this Court's recognition of the "qualitative difference" of the death penalty requires the benefit of a jury. In *Furman* v. *Georgia*, 408 U. S., at 238, the Court struck down the then-existing capital sentencing statutes of Georgia and Texas, in large part because of its conclusion that, under those statutes, the penalty was applied arbitrarily and discriminatorily. See also *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.). Since then, the Court has emphasized its pursuit of the "twin objectives" of "measured, consistent application and fairness to the accused." *Eddings*

v. *Oklahoma*, 455 U. S. 104, 110–111 (1982).[7] If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. *Zant* v. *Stephens*, 462 U. S. 862, 873–880 (1983); *Furman* v. *Georgia*, 408 U. S., at 294 (BRENNAN, J., concurring). It must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime. *Lockett* v. *Ohio*, *supra*.

Nothing in those twin objectives suggests that the sentence must or should be imposed by a jury. While it is to be hoped that current procedures have greatly reduced the risk that jury sentencing will result in arbitrary or discriminatory application of the death penalty, see *Gregg* v. *Georgia*, 428 U. S., at 190–195 (joint opinion), there certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that *requires* that the sentence be imposed by a jury.

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[7] Because the death sentence is unique in its severity and in its irrevocability, *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *Furman* v. *Georgia*, 408 U. S. 238, 286–291 (1972) (BRENNAN, J., concurring), the Court has carefully scrutinized the States' capital sentencing schemes to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death. *Zant* v. *Stephens*, 462 U. S. 862, 876–877 (1983); *Enmund* v. *Florida*, 458 U. S. 782, 788–789 (1982); *Godfrey* v. *Georgia*, 446 U. S. 420, 428–429 (1980); *Gardner* v. *Florida*, 430 U. S. 349, 360–361 (1977) (plurality opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 254–260 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *Gregg* v. *Georgia*, 428 U. S., at 196–207; *Furman* v. *Georgia*, *supra*. At the same time, the Court has insisted that the sentencing decision be based on the facts and circumstances of the individual and his crime. *Zant* v. *Stephens*, 462 U. S., at 879; *Eddings* v. *Oklahoma*, 455 U. S., at 110–112; *Lockett* v. *Ohio*, 438 U. S. 586, 601–605 (1978) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S., at 197; *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304 (1976) (plurality opinion).

Petitioner's primary argument is that the laws and practice in most of the States indicate a nearly unanimous recognition that juries, not judges, are better equipped to make reliable capital sentencing decisions and that a jury's decision for life should be inviolate. The reason for that recognition, petitioner urges, is that the nature of the decision whether a defendant should live or die sets capital sentencing apart and requires that a jury have the ultimate word. Noncapital sentences are imposed for various reasons, including rehabilitation, incapacitation, and deterrence. In contrast, the primary justification for the death penalty is retribution. As has been recognized, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.*, at 184. The imposition of the death penalty, in other words, is an expression of community outrage. Since the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death. If the answer is no, that decision should be final.

Petitioner's argument obviously has some appeal. But it has two fundamental flaws. First, the distinctions between capital and noncapital sentences are not so clear as petitioner suggests. Petitioner acknowledges, for example, that deterrence may be a justification for capital as well as for noncapital sentences. He suggests only that deterrence is not a proper consideration for particular sentencers who are deciding whether the penalty should be imposed in a given case. The same is true, however, in noncapital cases. Whatever the sentence, its deterrent function is primarily a consideration for the legislature. *Gregg* v. *Georgia*, 428 U. S., at 186 (joint opinion). Similar points can be made about the other purposes of capital and noncapital punishment. Although incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding. *Id.*, at 183, n. 28; *Jurek* v. *Texas*, 428 U. S. 262 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.). While retribution clearly plays a more prominent role in a capital case, retribution is an element of all punishments society imposes, and there is no suggestion as to any of these that the sentence may not be imposed by a judge.

Second, even accepting petitioner's premise that the retributive purpose behind the death penalty is the element that sets the penalty apart, it does not follow that the sentence must be imposed by a jury. Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. See, *e. g.*, *Gregg* v. *Georgia*, *supra; Woodson* v. *North Carolina*, 428 U. S., at 302–303; *Zant* v. *Stephens*, 462 U. S., at 879–880. The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. See *Gregg* v. *Georgia*, 428 U. S., at 183–184 (joint opinion); *Furman* v. *Georgia*, 408 U. S., at 394–395 (BURGER, C. J., dissenting); *id.*, at 452–454 (POWELL, J., dissenting).

We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. See *Gregg* v. *Georgia*, 428 U. S., at 181 (joint opinion); *Williams* v. *Florida*, 399 U. S. 78, 100 (1970); *Duncan* v. *Louisiana*, 391 U. S., at 156; *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, n. 15 (1968). The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.[8]

We also acknowledge the presence of the majority view that capital sentencing, unlike other sentencing, should be performed by a jury. As petitioner points out, 30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life.[9]

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[8] Petitioner's efforts to distinguish the considerations relevant to imposition of a capital or a noncapital sentence bear more on the jury's ability to function as the sentencer in a capital case than on the constitutionality of the judge's doing so. We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. See ABA Standards for Criminal Justice 18–1.1, Commentary, pp. 18·21–18·22 (2d ed. 1980) (reserving capital sentencing from general disapproval of jury involvement in sentencing). Sentencing by the trial judge certainly is not required by *Furman* v. *Georgia*, *supra*. See *Gregg* v. *Georgia*, 428 U. S., at 188–195 (joint opinion). What we do not accept is that, because juries may sentence, they constitutionally must do so.

[9] Twenty-nine jurisdictions allow a death sentence only if the jury recommends death, unless the defendant has requested trial or sentencing by the court. See Ark. Stat. Ann. § 41–1301 (1977); Cal. Penal Code Ann. § 190.3 (West Supp. 1984); Colo. Rev. Stat. § 16–11–103 (1978 and Supp. 1983); Conn. Gen. Stat. § 53a–46a (1983); Del. Code Ann., Tit. 11, § 11–4209 (1979 and Supp. 1982); Ga. Code Ann. §§ 17–10–30 to 17–10–32 (1982); Ill. Rev. Stat., ch. 38, ¶ 9–1 (Supp. 1984); Ky. Rev. Stat. § 532.025(1)(b) (Supp. 1982); La. Code Crim. Proc. Ann., Art. 905.8 (West Supp. 1984); Md. Ann. Code, Art. 27, § 413 (Supp. 1983); Mass. Gen. Laws Ann., ch. 279, §§ 68, 70 (West Supp. 1984); Miss. Code Ann. § 99–19–101 (Supp. 1983); Mo. Rev. Stat. § 565.006 (Supp. 1982); N. H. Rev. Stat. Ann. § 630.5 (Supp. 1983); N. J. Stat. Ann. § 2C:11–3(c) (West 1982); N. M. Stat. Ann. § 31–20A–3 (1981); N. C. Gen. Stat. § 15A–2000 (1983); Ohio Rev. Code Ann. § 2929.03 (1982); Okla. Stat., Tit. 21, § 701.11 (1981); 42 Pa. Cons. Stat. § 9711(f) (1982); S. C. Code § 16–3–20 (Supp. 1983); S. D. Comp. Laws Ann. § 23A–27A–4 (1979); Tenn. Code Ann. § 39–2–203 (1982); Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 1981 and Supp. 1984); Utah Code Ann. § 76–3–207 (Supp. 1983); Va. Code § 19.2–264.4 (1983); Wash. Rev. Code

The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. See *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982); *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion). In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme. See *Pulley* v. *Harris*, 465 U. S. 37 (1984); *Zant* v. *Stephens*, 462 U. S., at 884; *Gregg* v. *Georgia*, 428 U. S., at 195 (joint opinion). The Court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. *Barclay* v. *Florida*, 463

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§ 10.95.030 (1983); Wyo. Stat. § 6-2-102 (1983); 49 U. S. C. App. § 1473(c). In Nevada, the jury is given responsibility for imposing the sentence in a capital case, but if the jury cannot agree, a panel of three judges may impose the sentence. Nev. Rev. Stat. §§ 175.554, 175.556 (1981). In Arizona, Idaho, Montana, and Nebraska, the court alone imposes the sentence. Ariz. Rev. Stat. Ann. § 13-703 (Supp. 1983-1984); Idaho Code § 19-2515 (1979); Mont. Code Ann. § 46-18-301 (1983); Neb. Rev. Stat. § 29-2520 (1979). Besides Florida, the only States that allow a judge to override a jury's recommendation of life are Alabama and Indiana. Ala. Code § 13A-5-46 (1982); Ind. Code § 35-50-2-9 (Supp. 1984).

U. S. 939 (1983); *Proffitt* v. *Florida,* 428 U. S. 242, 252 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.). We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.

## IV

Our determination that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed also disposes of petitioner's double jeopardy challenge to the jury-override procedure. If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury.

## V

Petitioner's final challenge is to the application of the standard the Florida Supreme Court has announced for allowing a trial court to override a jury's recommendation of life. See *Tedder* v. *State,* 322 So. 2d 908, 910 (1975). This Court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. See *Dobbert* v. *Florida,* 432 U. S. 282, 294–295 (1977). See also *Proffitt,* 428 U. S., at 249 (joint opinion). We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. See *Richardson* v. *State,* 437 So. 2d 1091, 1095 (Fla. 1983); *Miller* v. *State,* 332 So. 2d 65 (Fla. 1976). Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.

We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla. Stat. § 921.141(3) (1983). The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously. § 921.141(4). As JUSTICE STEVENS noted in *Barclay*, there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death. See *Barclay* v. *Florida*, 463 U. S., at 971–972, and n. 23 (opinion concurring in judgment).

In this case, the trial judge based his decision on the presence of two statutory aggravating circumstances. The first, that the defendant had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person, § 921.141(5), was based on evidence not available to the advisory jury but, under Florida law, was properly considered by the trial judge. See *White* v. *State*, 403 So. 2d 331, 339–340 (1981). Petitioner's prior conviction was for rape and aggravated battery. The trial judge also found that the murder in this case was heinous, atrocious, and cruel. The witness who accompanied petitioner to the dump site where the victim's body was found testified that the body was covered with blood and that there were cuts on the breasts, stomach, and chest. The witness also testified that petitioner had recounted his torture of the victim while she was still living. The trial judge found no mitigating circumstances.

The Florida Supreme Court reviewed petitioner's sentence and concluded that the death penalty was properly imposed under state law. It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court. See *Barclay* v. *Florida*, 463 U. S., at 968 (STEVENS, J., concurring in judgment). Whether or not "reasonable people" could differ over the result here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case.

The judgment of the Supreme Court of Florida is affirmed.

*It is so ordered.*

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join the Court's opinion and judgment except for the dictum on page 456 of the opinion indicating that *Beck* v. *Alabama*, 447 U. S. 625 (1980), requires a state court in the trial of a capital case to permit the defendant to waive the statute of limitations and to give a lesser-included-offense instruction as to an offense that would otherwise be barred.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

In this case, as in 82 others arising under the capital punishment statute enacted by Florida in 1972, the trial judge sentenced the defendant to death after a jury had recommended a sentence of life imprisonment. The question presented is whether the Constitution of the United States permits petitioner's execution when the prosecution has been unable to persuade a jury of his peers that the death penalty is the appropriate punishment for his crime.

The Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property without due process of law." The concept of due process permits no such deprivation—whether of life, liberty, or property—to occur if it is grossly excessive in the particular case—if it is "cruel and unusual punishment" proscribed by the Eighth Amendment.[1] The differences between the three categories, however, are not mere matters of degree. For although we look to state law as the source of the right to property, "it is not the source of liberty, and surely not the exclusive source." *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting). See *Board of Regents* v. *Roth*, 408 U. S. 564, 572, 577 (1972). Because a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State's deprivation of a person's life is also qualitatively different from any lesser intrusion on liberty.

In the 12 years since *Furman* v. *Georgia*, 408 U. S. 238 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.[2] Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live[3]—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official. This conviction is consistent with the judg-

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[1] See *Solem* v. *Helm*, 463 U. S. 277, 288–290 (1983). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment. *E. g.*, *Robinson* v. *California*, 370 U. S. 660, 666 (1962); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463 (1947) (plurality opinion).

[2] See *Solem* v. *Helm*, 463 U. S., at 289; *id.*, at 306 (BURGER, C. J., dissenting); *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Rummel* v. *Estelle*, 445 U. S. 263, 272 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion); *Coker* v. *Georgia*, 433 U. S. 584, 598 (1977) (plurality opinion);

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*Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

[3] "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, "You are not fit for this world, take your chance elsewhere."'" *Furman*, 408 U. S., at 290 (BRENNAN, J., concurring) (citation omitted) (quoting Stephen, Capital Punishments, 69 Fraser's Magazine 753, 763 (1864)). See also 408 U. S., at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity").

ment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decisionmaker that is best able to "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968) (footnote omitted).

## I

Florida has adopted an unusual "trifurcated" procedure for identifying the persons convicted of a capital felony who shall be sentenced to death. It consists of a determination of guilt or innocence by the jury, an advisory sentence by the jury, and an actual sentence imposed by the trial judge. *Proffitt* v. *Florida*, 428 U. S. 242, 248–250 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).[4] The judge's determination is then reviewed by the Florida Supreme Court to determine whether the aggravating and mitigating circumstances found by the trial judge are supported by the evidence and justify a sentence of death. *Id.*, at 250–251, 253.

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[4] The Court correctly treats the question whether this procedure is constitutional as an open one. The question has been explicitly reserved for decision by the Court in the past. See *Bell* v. *Ohio*, 438 U. S. 637, 642–643, n. (1978) (plurality opinion); *Lockett* v. *Ohio*, 438 U. S., at 609, n. 16 (plurality opinion). In *Proffitt*, in which we considered a number of aspects of this statute, this precise issue did not arise since the advisory jury had recommended that Proffitt be sentenced to death. 428 U. S., at 246 (opinion of Stewart, POWELL, and STEVENS, JJ.). Thus, my description of *Proffitt* as containing a holding on this point in *Barclay* v. *Florida*, 463 U. S. 939, 971 (1983) (STEVENS, J., concurring in judgment), was incorrect. Death sentences based on the trial judge's rejection of a jury's recommendation were vacated without considering this question in *Gardner* v. *Florida*, 430 U. S. 349 (1977), and *Arizona* v. *Rumsey*, 467 U. S. 203 (1984). A death sentence in a case in which the advisory jury had recommended life imprisonment was upheld in *Dobbert* v. *Florida*, 432 U. S. 282 (1977), but there certiorari was granted only to consider the permissibility of the sentence under the *Ex Post Facto* Clause, see *id.*, at 284. Such a sentence was also upheld in *Barclay*, but this issue was neither raised nor decided.

Because this procedure was adopted by a democratically elected legislature, "we presume its validity," *Gregg* v. *Georgia*, 428 U. S. 153, 175 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Nevertheless, this presumption could not be conclusive, or the Eighth Amendment would be effectively read out of the Constitution. The Eighth Amendment is based on the recognition that there are occasions on which the State or Federal Governments will undertake to punish in a manner inconsistent with a fundamental value that the Framers wished to secure against legislative majorities. Thus, the Court correctly states: "'Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is ultimately for us to judge whether the Eighth Amendment' is violated by a challenged practice." *Ante*, at 464 (quoting *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982)). Our cases have established the appropriate mode of analysis—there must be "an assessment of contemporary values concerning the infliction of a challenged sanction," to determine whether punishment has been imposed in a way that offends an "evolving standar[d] of decency," *Gregg*, 428 U. S., at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.).[5]

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[5] See *Enmund* v. *Florida*, 458 U. S., at 813 (O'CONNOR, J., dissenting); *Coker* v. *Georgia*, 433 U. S., at 603–604 (POWELL, J., concurring in judgment in part and dissenting in part); *Woodson* v. *North Carolina*, 428 U. S. 280, 288 (1976) (plurality opinion). There is another aspect to Eighth Amendment analysis unrelated to contemporary standards of decency: "[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. . . . [T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg*, 428 U. S., at 182–183 (opinion of Stewart, POWELL, and STEVENS, JJ.) (citation omitted). See also *Rhodes* v. *Chapman*, 452 U. S. 337, 346 (1981); *Estelle* v. *Gamble*, 429 U. S. 97, 103 (1976). No one contends, however, that judicial sentencing in capital cases results in the gratuitous infliction of suffering so as to violate this aspect of the Eighth Amendment.

## II

Inquiry into the practices adopted by the majority of legislatures provides a logical starting point for determining whether the practice at issue here comports with the Eighth Amendment: "[L]egislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency." *Woodson* v. *North Carolina*, 428 U. S. 280, 294–295 (1976) (plurality opinion).[6]

The judgment of the people's representatives firmly supports the conclusion that the jury ought to make the life-or-death decision necessary in capital cases. "Except for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha* v. *California*, 402 U. S. 183, 200, n. 11 (1971). For example, of 42 jurisdictions that employed discretionary capital sentencing in 1948, only 3 did not require its imposition through jury determinations which the trial judge could not disregard.[7] At the time of *Furman*, only 2 jurisdictions of the 41 which employed discretionary capital punishment permitted a death sentence to be imposed without the consent of a jury.[8] Currently, as the Court explains, *ante*, at 463, 30 of the 37 jurisdictions with capital punishment statutes require that the decision to impose the death penalty be made with the consent of a jury, and only 3 jurisdictions permit an override of a jury's recommendation of leniency.

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[6] See also *Solem* v. *Helm*, 463 U. S., at 291–292; *Enmund* v. *Florida*, 458 U. S., at 789–793; *Coker* v. *Georgia*, 433 U. S., at 592–596 (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325, 352–354 (1976) (WHITE, J., dissenting); *Gregg*, 428 U. S., at 179–181 (opinion of Stewart, POWELL, and STEVENS, JJ.).

[7] See *Andres* v. *United States*, 333 U. S. 740, 767–770 (1948) (Frankfurter, J., concurring).

[8] See *Witherspoon* v. *Illinois*, 391 U. S. 510, 525–527, and nn. 2–8 (1968) (opinion of Douglas, J.); Brief for United States as *Amicus Curiae* in *McGautha* v. *California*, O. T. 1970, No. 203, and *Crampton* v. *Ohio*, O. T. 1970, No. 204, pp. 36, 132–137.

In *Enmund* v. *Florida*, 458 U. S. 782 (1982), we relied on the fact that only one-third of the jurisdictions with capital statutes permitted the imposition of the death penalty on a defendant who had not intended the death of his victim as strong support for our conclusion that in such cases the imposition of capital punishment offends contemporary standards of decency and therefore violates the Eighth Amendment. See *id.*, at 792. Here the level of consensus is even greater, thereby demonstrating a strong community feeling that it is only decent and fair to leave the life-or-death decision to the authentic voice of the community—the jury—rather than to a single governmental official. Examination of the historical and contemporary evidence thus unequivocally supports the conclusion reached by the Royal Commission on Capital Punishment three decades ago:

> "For our part, we have no hesitation in agreeing with the many witnesses who considered that, in this country at least, the responsibility of deciding whether a person convicted of murder should be sentenced to death or to a lesser punishment is too heavy a burden to impose on any single individual. The sentence of death differs absolutely, not in degree, from any other sentence; and it would be wholly inconsistent with our traditional approach to such issues to lay on the shoulders of the Judge a responsibility so grave and invidious. It is more in accord with the instinct of our people to entrust to the men and women of the jury a joint responsibility for decisions which will affect the life of the accused." Royal Commission on Capital Punishment, 1949–1953, Report 193–194 (1953).[9]

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[9] The British experience is particularly relevant since the Eighth Amendment was derived from the Magna Carta and the English Declaration of Rights. See *Solem* v. *Helm*, 463 U. S., at 284–285; *Gregg*, 428 U. S., at 169–170 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Furman* v. *Georgia*, 408 U. S. 238, 316–322 (1972) (MARSHALL, J., concurring); *Trop* v. *Dulles*, 356 U. S. 86, 99–101 (1958) (plurality opinion).

## III

Florida is one of only a few States that permits the imposition of a sentence of death without the consent of a jury. Examination of the reasons for Florida's decision illuminates the extent to which this statute can be considered consistent with contemporary standards of fairness and decency.

During the century between 1872 and 1972 Florida law required the jury to make the capital sentencing decision. The change in the decisionmaking process that occurred in 1972 was not motivated by any identifiable change in the legislature's assessment of community values; rather, it was a response to this Court's decision in *Furman*. In *Furman* a plurality of the Court had condemned the arbitrary pattern of results under the then-existing capital punishment statutes.[10] A number of States responded to *Furman* by reducing the discretion granted to juries not because of some deeply rooted communal value, but rather in an attempt to comply with the several opinions in that case.[11] In *Dobbert* v. *Florida*, 432 U. S. 282 (1977), we specifically noted that the Florida jury override now under challenge was adopted in an attempt to comply with *Furman*, see 432 U. S., at 294–297.[12] We have subsequently made it clear that jury sentencing is not inconsistent with *Furman*,[13] thereby undermining the basis for the legislative judgment challenged here. A legislative choice that is predicated on this sort of misunderstanding is not entitled to the same presumption of validity as one that rests wholly on a legislative assessment of sound policy and community sentiment.[14]

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[10] See 408 U. S., at 249–257 (Douglas, J., concurring); *id.*, at 291–295 (BRENNAN, J., concurring); *id.*, at 309–310 (Stewart, J., concurring); *id.*, at 314 (WHITE, J., concurring). See also *id.*, at 364–366 (MARSHALL, J., concurring).

[11] See *Lockett* v. *Ohio*, 438 U. S., at 599–600 (plurality opinion); *Woodson*, 428 U. S., at 298–299 (plurality opinion).

[12] See also Ehrhardt & Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & C. 10 (1973). In this very case the Florida Supreme Court said that "allowing the jury's recommendation to be binding would violate *Furman*," 433 So. 2d 508, 512 (1983). See also *Johnson* v. *State*, 393 So. 2d 1069, 1074 (Fla.) *(per curiam)*, cert. denied, 454 U. S. 882 (1981); *Douglas* v. *State*, 373 So. 2d 895, 897 (Fla. 1979) *(per curiam)*.

Even apart from its history, there is reason to question whether the Florida statute can be viewed as representing a judgment that judicial sentencing is consistent with contemporary standards. The administration of the statute actually reflects a deeply rooted impulse to legitimate the process through involvement of the jury. That is made evident not only through the use of an advisory jury,[15] but also by the fact that the statute has been construed to forbid a trial judge to reject the jury's decision unless he finds that the evidence favoring a sentence of death is so clear and convincing that virtually no reasonable person could impose a lesser sentence.[16] Thus, the Florida experience actually lends support to the conclusion that American jurisprudence has considered the use of the jury to be important to the fairness and legitimacy of capital punishment.

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[13] See *Zant* v. *Stephens*, 462 U. S. 862, 874–875 (1983); *Gregg*, 428 U. S., at 190–195 (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 221–224 (WHITE, J., concurring in judgment).

[14] A separate reason for discounting the normal presumption of validity is that the statute has not worked as intended to protect the rights of the defendant. Although technically only the judge may impose a death sentence, in a practical sense the accused confronts the jeopardy of a death sentence twice. If the jury recommends death, an elected Florida judge sensitive to community sentiment would have an additional reason to follow that recommendation. If there are any cases in which the jury override procedure has worked to the defendant's advantage because the trial judge rejected a jury's recommendation of death, they have not been brought to our attention by the Attorney General of Florida, who would presumably be aware of any such cases. On the other hand, the fact that more persons identify with victims of crime than with capital defendants inevitably encourages judges who must face election to reject a recommendation of leniency. The fact that 83 defendants persuaded juries to recommend mercy but were thereafter sentenced to death under the Florida statute lends support to the thesis that as a practical matter the prosecution is given two chances to obtain a death sentence under the statute.

[15] In all capital cases, even those in which the defendant pleaded guilty or waived a jury on the issue of guilt or innocence, the Florida statute requires the enpanelment of an advisory jury and that it render a sentence unless the advisory jury is separately waived by the defendant. See Fla. Stat. §§ 921.141(1) and (2) (1983).

## IV

The Court correctly notes that sentencing has traditionally been a question with which the jury is not concerned. *Ante*, at 459. Deciding upon the appropriate sentence for a person who has been convicted of a crime is the routine work of judges. By reason of this experience, as well as their training, judges presumably perform this function well. But, precisely because the death penalty is unique, the normal presumption that a judge is the appropriate sentencing authority does not apply in the capital context. The decision whether or not an individual must die is not one that has traditionally been entrusted to judges. This tradition, which has marked a sharp distinction between the usual evaluations of judicial competence with respect to capital and noncapital sentencing, not only eliminates the general presumption that judicial sentencing is appropriate in the capital context, but also in itself provides reason to question whether assigning this role to governmental officials and not juries is consistent with the community's moral sense.[17]

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[16] See *Dobbert*, 432 U. S., at 295–296 (citing *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975)); *Proffitt* v. *Florida*, 428 U. S. 242, 248–249 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (same).

[17] In *Proffitt*, the joint opinion stated: "[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and is therefore better able to impose sentences similar to those imposed in analogous cases." *Id.*, at 252 (opinion of Stewart, POWELL, and STEVENS, JJ.). Of course, since Proffitt was not challenging judicial sentencing in that case, see n. 4,

While tradition and contemporary practice in most American jurisdictions indicate that capital sentencing by judges offends a moral sense that this unique kind of judgment must be made by a more authentic voice of the community, nevertheless the Court is correct to insist that these factors cannot be conclusive, or the Eighth Amendment would prevent any innovation or variation in the administration of the criminal law. *Ante*, at 464. Therefore, a more focused inquiry into the Eighth Amendment implications of the decision to put an accused to death, and the jury's relationship to those implications, is essential.

## V

Punishment may be "cruel and unusual" because of its barbarity or because it is "excessive" or "disproportionate" to the offense.[18] In order to evaluate a claim that a punishment is excessive, one must first identify the reasons for imposing it. In general, punishment may rationally be imposed for four reasons: (1) to rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter

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*supra*, this statement was directed only at the risk of arbitrariness that had been identified by the plurality in *Furman*, and was not concerned with the claim made here that jury sentencing is more consistent with community values. Moreover, experience under the Florida statute indicates that this prediction concerning judicial sentencing has not been borne out. Not only has the Florida Supreme Court proved much more likely to reverse in a jury override case than in any other type of capital case, see Radelet & Vandiver, The Florida Supreme Court and Death Penalty Appeals, 74 J. Crim. L. & C. 913 (1983), but also the clear majority of override cases ultimately result in sentences of life imprisonment rather than death. See App. B to Brief for Petitioner. Thus, it is doubtful that judicial sentencing has worked to reduce the level of capital sentencing disparity; if anything, the evidence in override cases suggests that the jury reaches the appropriate result more often than does the judge.

[18] See *Solem* v. *Helm*, 463 U. S., at 284; *Enmund*, 458 U. S., at 788; *Rhodes* v. *Chapman*, 452 U. S., at 346; *Coker* v. *Georgia*, 433 U. S., at 591–592 (plurality opinion); *Estelle* v. *Gamble*, 429 U. S., at 102–103; *Gregg*, 428 U. S., at 171–173 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Weems* v. *United States*, 217 U. S. 349, 371 (1910).

others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution. The first of these purposes is obviously inapplicable to the death sentence. The second would be served by execution, but in view of the availability of imprisonment as an alternative means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern.[19] We are thus left with deterrence and retribution as the justifications for capital punishment.[20]

A majority of the Court has concluded that the general deterrence rationale adequately justifies the imposition of capital punishment at least for certain classes of offenses for which the legislature may reasonably conclude that the death penalty has a deterrent effect. However, in reaching this conclusion we have stated that this is a judgment peculiarly within the competence of legislatures and not the judiciary.[21]

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[19] Although incapacitation was identified as one rationale that had been advanced for the death penalty in *Gregg*, 428 U. S., at 183, n. 28 (opinion of Stewart, POWELL, and STEVENS, JJ.), we placed no reliance upon this rationale in upholding the imposition of capital punishment under the Eighth Amendment, and this ground was not mentioned at all by four of the seven Justices who voted to uphold the death penalty in *Gregg* and its companion cases, see *Roberts* v. *Louisiana*, 428 U. S., at 350–356 (WHITE, J., dissenting, joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ.). In any event, incapacitation alone could not justify the imposition of capital punishment, for if it did mandatory death penalty statutes would be constitutional, and, as we have held, they are not. See *ante*, at 461–462.

[20] See *Roberts* v. *Louisiana*, 428 U. S., at 354–355 (WHITE, J., dissenting); *Gregg*, 428 U. S., at 183–186 (opinion of Stewart, POWELL, and STEVENS, JJ.). See also *id.*, at 233 (MARSHALL, J., dissenting).

[21] In *Gregg*, Justice Stewart, JUSTICE POWELL, and I wrote:

"Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as

Thus, the deterrence rationale cannot be used to support the use of judicial as opposed to jury discretion in capital sentencing, at least absent some finding, which the Florida Legislature has not purported to make, that judges are better at gauging the general deterrent effect of a capital sentence than are juries.

Moreover, the deterrence rationale in itself argues only for ensuring that the death sentence be imposed in a significant number of cases and remain as a potential social response to the defined conduct. Since the decision whether to employ jury sentencing does not change the number of cases for which death is a possible punishment, the use of judicial sentencing cannot have sufficient impact on the deterrent effect of the statute to justify its use;[22] a murderer's calculus will not be affected by whether the death penalty is imposed by a judge or jury.[23]

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murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

"The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent." *Id.*, at 185–186 (footnotes and citation omitted).

See also *Roberts* v. *Louisiana*, 428 U. S., at 354–355 (WHITE, J., dissenting). The Court takes this same approach today, *ante*, at 461.

[22] Cf. *Enmund*, 458 U. S., at 798–800 (imposition of death penalty on those lacking an intent to kill has too attenuated a deterrent effect to be justified by deterrence); *Lockett* v. *Ohio*, 438 U. S., at 625 (WHITE, J., concurring in part and dissenting in part) (same).

[23] The Florida Legislature did not purport to make a contrary finding, nor does the Court advance an enhanced deterrent effect as a justification for judicial sentencing. Indeed, such an argument would be especially anomalous in this case in light of the deference generally given jury determinations under the Florida statute.

Finally, even though the deterrence rationale may provide a basis for identifying the defendants eligible for the death penalty, our cases establish that the decision whether to condemn a man to death in a given case may not be the product of deterrence considerations alone. Despite the fact that a legislature may rationally conclude that mandatory capital punishment will have a deterrent effect for a given class of aggravated crimes significantly greater than would discretionary capital sentencing, we have invalidated mandatory capital punishment statutes, as well as statutes that do not permit the trier of fact to consider any mitigating circumstance, even if unrelated to or perhaps inconsistent with the deterrent purposes of the penalty. It is now well settled that the trier of fact in a capital case must be permitted to weigh any consideration—indeed any aspect of the defendant's crime or character—relevant to the question whether death is an excessive punishment for the offense.[24] Thus, particular capital sentencing decisions cannot rest entirely on deterrent considerations.

In the context of capital felony cases, therefore, the question whether the death sentence is an appropriate, nonexcessive response to the particular facts of the case will depend on the retribution justification. The nature of that justification was described in *Gregg:*

> "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely

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[24] See *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S., at 604-608 (plurality opinion); *Roberts* v. *Louisiana*, 431 U. S. 633 (1977) *(per curiam); Roberts* v. *Louisiana*, 428 U. S., at 333-334 (plurality opinion); *Woodson*, 428 U. S., at 303-305 (plurality opinion); *Jurek* v. *Texas*, 428 U. S. 262, 271-272 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). See also *California* v. *Ramos*, 463 U. S. 992, 1006 (1983); *Enmund*, 458 U. S., at 798.

> on legal processes rather than self-help to vindicate their wrongs." 428 U. S., at 183–184 (opinion of Stewart, POWELL, and STEVENS, JJ.) (footnote omitted).[25]

Thus, in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we called in *Enmund* the "moral guilt" of the defendant. 458 U. S., at 800–801. And if the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility—its demand that a given affront to humanity requires retribution—it follows, I believe, that a representative cross section of the community must be given the responsibility for making that decision. In no other way can an unjustifiable risk of an excessive response be avoided.

## VI

The authors of our federal and state constitutional guarantees uniformly recognized the special function of the jury in any exercise of plenary power over the life and liberty of the citizen. In our jurisprudence, the jury has always played an essential role in legitimating the system of criminal justice.

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions

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[25] See also *Furman*, 408 U. S., at 308 (Stewart, J., concurring); *id.*, at 452–454 (POWELL, J., dissenting).

> strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan* v. *Louisiana*, 391 U. S. 145, 155–156 (1968) (footnote omitted).[26]

Thus, the jury serves to ensure that the criminal process is not subject to the unchecked assertion of arbitrary governmental power; community participation is "critical to public confidence in the fairness of the criminal justice system." *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975).[27]

The same consideration that supports a constitutional entitlement to a trial by a jury rather than a judge at the guilt or innocence stage—the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty—applies with special force to the determination that must precede a deprivation of life. In many respects capital sentencing resembles a trial on the question of guilt, involving as it does a prescribed burden of proof of given elements through the adversarial process.[28] But more important than its procedural aspects, the life-or-death decision in capital cases depends upon its link to community values for its moral and constitutional legitimacy. In *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), after observing that "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death," *id.*, at 519 (footnote omitted), the Court added:

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[26] See also *Brown* v. *Louisiana*, 447 U. S. 323, 330 (1980) (plurality opinion); *Burch* v. *Louisiana*, 441 U. S. 130, 135 (1979); *Ballew* v. *Georgia*, 435 U. S. 223, 229–230 (1978) (opinion of BLACKMUN, J.); *Apodaca* v. *Oregon*, 406 U. S. 404, 410 (1972) (plurality opinion); *Williams* v. *Florida*, 399 U. S. 78, 100 (1970).

[27] See also *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972).

> "[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a line without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.*, at 519, n. 15 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)).[29]

That the jury is central to the link between capital punishment and the standards of decency contained in the Eighth Amendment is amply demonstrated by history. Under the common law capital punishment was mandatory for all felonies, and even through the last century it was mandatory for large categories of offenses. "[O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense." *Woodson*, 428 U. S., at 301 (plurality opinion). The jury played a critical role in this process. Juries refused to convict in cases in which they felt the death penalty to be morally unjustified. This forced the adoption of more enlightened capital punishment statutes that were more in accord with the community's moral sensibilities:

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[28] See *Bullington* v. *Missouri*, 451 U. S. 430, 438 (1981). See also *Arizona* v. *Rumsey*, 467 U. S., at 209–210.

[29] Accord, *McGautha* v. *California*, 402 U. S. 183, 201–202 (1971); *Furman*, 408 U. S., at 388–389 (BURGER, C. J., dissenting); *id.*, at 439–441 (POWELL, J., dissenting). See generally Note, The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking Power, 35 Stan. L. Rev. 787, 810–820 (1983).

> "At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict. As we have seen, the initial movement to reduce the number of capital offenses and to separate murder into degrees was prompted in part by the reaction of jurors as well as by reformers who objected to the imposition of death as the penalty for any crime. Nineteenth century journalists, statesmen, and jurists repeatedly observed that jurors were often deterred from convicting palpably guilty men of first-degree murder under mandatory statutes. Thereafter, continuing evidence of jury reluctance to convict persons of capital offenses in mandatory death penalty jurisdictions resulted in legislative authorization of discretionary jury sentencing . . . ." *Id.*, at 293 (footnote omitted).[30]

Thus the lesson history teaches is that the jury—and in particular jury sentencing—has played a critical role in ensuring that capital punishment is imposed in a manner consistent with evolving standards of decency. This is a lesson of constitutional magnitude, and one that was forgotten during the enactment of the Florida statute.

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[30] See also *Eddings* v. *Oklahoma*, 455 U. S., at 110–111; *Lockett* v. *Ohio*, 438 U. S., at 597–598 (plurality opinion); *Furman*, 408 U. S., at 245–247 (Douglas, J., concurring); *id.*, at 297–299 (BRENNAN, J., concurring); *id.*, at 339 (MARSHALL, J., concurring); *McGautha*, 402 U. S., at 197–202; *Andres* v. *United States*, 333 U. S., at 753 (Frankfurter, J., concurring).

## VII

The importance of the jury to the legitimacy of the capital sentencing decision has been a consistent theme in our evaluation of post-*Furman* capital punishment statutes. In *Gregg,* we reaffirmed the link between evolving standards of decency and the imposition of capital punishment provided by the jury, as well as the traditional function of the jury in ensuring that the death penalty is assessed only in cases where its imposition is consistent with Eighth Amendment standards:

> "The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that 'one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.' It may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se.* Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." 428 U. S., at 181–182 (opinion of Stewart, POWELL, and STEVENS, JJ.) (footnote and citations omitted) (quoting *Witherspoon,* 391 U. S., at 519, n. 15).[31]

Highly relevant to the present inquiry is the invalidation of post-*Furman* statutes requiring mandatory death sentences because they broke the critical link provided by the jury between the death penalty and community standards:

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[31] See also *Enmund,* 458 U. S., at 794–796; *Coker* v. *Georgia,* 433 U. S., at 596–597 (plurality opinion).

> "[E]vidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary statutes. In *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the Court observed that 'one of the most important functions any jury can perform' in exercising its discretion to choose 'between life imprisonment and capital punishment' is 'to maintain a link between contemporary community values and the penal system.' *Id.*, at 519, and n. 15. Various studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty 'with any great frequency.'" *Woodson*, 428 U. S., at 295 (plurality opinion) (footnote omitted) (quoting H. Kalven & H. Zeisel, The American Jury 436 (1966)).

We therefore concluded that "North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'" 428 U. S., at 301 (footnote omitted) (quoting *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion)).

That the jury provides a better link to community values than does a single judge is supported not only by our cases, but also by common sense. Juries—comprised as they are of a fair cross section of the community[32]—are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.[33] Indeed, as the preceding discussion demonstrates, the belief that juries more accurately reflect the conscience of the community than can a single judge is the central reason that the jury right has been recognized at the guilt stage in our jurisprudence. This same belief firmly supports the use of juries in capital sentencing, in order to address the Eighth Amendment's concern that capital punishment be administered consistently with community values. In fact, the available empirical evidence indicates that judges and juries do make sentencing decisions in capital cases in significantly different ways,[34] thus supporting the conclusion that entrusting the capital decision to a single judge creates an unacceptable risk that the decision will not be consistent with community values.

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[32] See, *e. g.*, *Duren* v. *Missouri*, 439 U. S. 357 (1979).

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[33] In his valuable article, Professor Gillers has written:

"Intuitively, juries, chosen in accordance with rules calculated to assure that they reflect a 'fair cross-section of the community,' are more likely to accurately express community values than are individual state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood, and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come. The response of a representative jury of acceptable size is consequently taken to be the community response. The jury does not try to determine what the community would say, but in giving its conclusion, speaks for the community. The judge, on the other hand, must assess the community's 'belief' or 'conscience' and impose it or must impose his own and assume it is the community's. Whichever the judge does, the representative jury would seem to have a substantially better chance of identifying the community view simply by speaking its mind.

"The intuitive expectation that a representative jury of adequate size will convey community values more reliably than will a single judge finds support in cases treating jury composition at culpability trials. In this related area, the Court has stressed the importance of a representative jury as an aid in assuring 'meaningful community participation,' and has accepted the idea that different segments of the community will bring to the representative jury 'perspectives and values that influence both jury deliberation and result.' In addition, the Court has said that juries of decreasing size have a reduced chance of reflecting minority viewpoints. The Court's conclusions that the size and representativeness of juries influence their ability to reflect community values support an inference that a representative jury of adequate size is also more likely than a single judge to reflect the community's retributive sentiment. Indeed, since capital sentencing involves application of community values, whereas guilt-determination predominantly demands factfinding, the Court's conclusions would seem to apply with even greater force in the capital sentencing area." Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 63–65 (1980) (footnotes omitted).

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[34] A respected study of the matter found that judges and juries disagree as to the imposition of the death penalty in 59 percent of the cases, with juries being much more likely to show mercy than judges. See H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment 37–50 (1968). This study must be viewed with some caution, because it was based on pre-*Furman* sentencing, when juries were given no guidance concerning the standards for decision. See Zeisel, *supra*, at 37–38, and n. 29. But then there were no standards for judges to follow either, and the wide disparity between judge and jury sentencing in an era in which all the sentencer could do was express its sense of proportionality, see *Witherspoon*, 391 U. S., at 519, and n. 15, suggests that judicial sentencing does not reflect the same moral sensibility as does jury sentencing. That there has been such a large number of jury overrides under the Florida statute tends to indicate that the disparity between judge and jury has continued in the post-*Furman* era. Indeed, the facts of this very case illustrate the point. While the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victim's body. It may well be that the jury was sufficiently convinced of petitioner's guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made, coupled with evidence indicating that petitioner had suffered serious head injuries when he was 20 years old which had induced a personality change, App. 35, see also 433 So. 2d, at 512 (McDonald, J., dissenting), that the jury concluded that a sentence of death could not be morally justified in this case. A judge trained to distinguish proof of guilt from questions concerning sentencing might react quite differently to this case than would a jury. See H. Melville, Billy Budd 72 (Pocket Books 1972) ("For the compassion how can I otherwise than share it. But, mindful of paramount obligations I strive against scruples that may tend to enervate decision. Not, gentlemen, that I hide from myself that this case is an exceptional one. Speculatively regarded, it well might be referred to a jury of casuists. But for us here acting not as casuists or moralists, in a case practical, and under martial law practically to be dealt with").

Thus, the legitimacy of capital punishment in light of the Eighth Amendment's mandate concerning the proportionality of punishment critically depends upon whether its imposition in a particular case is consistent with the community's sense of values. Juries have historically been, and continue to be, a much better indicator as to whether the death penalty is a disproportionate punishment for a given offense in light of community values than is a single judge. If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's "moral guilt." The Florida statute is thus inconsistent with "the need for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson*, 428 U. S., at 305 (plurality opinion); it "introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980). As a result, the statute "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion). Once a State, through specification of aggravating circumstances and meaningful appellate review of jury verdicts, develops a capital sentencing process which in the aggregate distinguishes between those who may live and those who will die in some acceptably nonarbitrary way,[35] *Furman* and its progeny provide no warrant for—indeed do not tolerate—the exclusion from the capital sentencing process of the jury and the critical contribution only it can make toward linking the administration of capital punishment to community values.

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[35] See *Pulley* v. *Harris*, 465 U. S. 37 (1984); *id.*, at 54 (STEVENS, J., concurring in part and concurring in judgment); *Zant* v. *Stephens*, 462 U. S., at 878–879; *Gregg*, 428 U. S., at 196–198, 200–204 (opinion of

## VIII

History, tradition, and the basic structure and purpose of the jury system persuade me that jury sentencing is essential if the administration of capital punishment is to be governed by the community's evolving standards of decency. The constitutional legitimacy of capital punishment depends upon the extent to which the process is able to produce results which reflect the community's moral sensibilities. Judges simply cannot acceptably mirror those sensibilities—the very notion of a right to jury trial is premised on that realization. Judicial sentencing in capital cases cannot provide the type of community participation in the process upon which its legitimacy depends.

If the State wishes to execute a citizen, it must persuade a jury of his peers that death is an appropriate punishment for his offense. If it cannot do so, then I do not believe it can be said with an acceptable degree of assurance that imposition of the death penalty would be consistent with the community's sense of proportionality. Thus, in this case Florida has authorized the imposition of disproportionate punishment in violation of the Eighth and Fourteenth Amendments. Accordingly, while I join Part II of the opinion of the Court, with respect to the remainder of the Court's opinion and its judgment, I respectfully dissent.

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Stewart, POWELL, and STEVENS, JJ.); *id.*, at 221–224 (WHITE, J., concurring in judgment).

# BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL.

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-498. Argued March 26, 1984—Decided July 2, 1984*

Section 93 of the New Jersey Casino Control Act requires annual registration of unions representing persons employed in casinos or casino hotels, and provides that a union may be prohibited from receiving dues from such employees and from administering any pension or welfare funds if any union officer is disqualified under the criteria contained in § 86 for the licensing of various entities and persons. Those criteria include convictions for enumerated offenses, or any other offenses indicating that licensure would be inimical to the Act's policy, and association with other criminal offenders. Appellees, a union whose membership includes persons employed in casino hotels in Atlantic City and the union's president, instituted an action against certain state agencies and officials in Federal District Court, seeking declaratory and injunctive relief after state administrative proceedings had been begun to determine whether certain of the union's officers were disqualified under the criteria of § 86. The court denied appellees' motion for a preliminary injunction against the state proceedings, concluding that appellees were unlikely to succeed on the merits of their claims, which included a claim that §§ 86 and 93 were pre-empted by the National Labor Relations Act (NLRA). The state administrative proceedings resulted in a finding that certain of the union's officials were disqualified under § 86, and in an order that if the officials were not removed from office the union would be barred from collecting dues from any of its members who were casino hotel employees licensed or registered under the New Jersey Act. The state agency also concluded that it would be unnecessary to invoke the additional § 93 sanction of prohibiting the disqualified officials from administering pension and welfare funds. Thereafter, the Court of Appeals held, *inter*

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*Together with No. 83-573, *Danziger, Acting Chairman, Casino Control Commission of New Jersey, et al.* v. *Hotel & Restaurant Employees & Bartenders International Union Local 54 et al.*, also on appeal from the same court.

*alia*, that the District Court erred in refusing to grant the preliminary injunction, and that § 93, insofar as it authorizes disqualification of elected union officials, is pre-empted by § 7 of the NLRA.

*Held:*

1. The so-called "local interests" exception to the pre-emption doctrine does not apply if the state law regulates conduct that is actually protected by federal law. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then the relative importance to the State of its law is not material, since the federal law must prevail by direct operation of the Supremacy Clause of the Federal Constitution. Pp. 500–503.

2. Section 93 of the New Jersey Act, to the extent that it regulates the qualifications of casino industry union officials, does not actually conflict with § 7 of the NLRA—which neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field of labor-management relations—and thus is not pre-empted by § 7. Although the 1945 decision in *Hill* v. *Florida*, 325 U. S. 538, interpreted § 7's express guarantee of the right of employees to choose their bargaining representative as also conferring an unfettered right on employees to choose the officials of their bargaining representative, Congress has subsequently disclaimed any intent to pre-empt all state regulation which touches upon the specific right of employees to decide which individuals will serve as officials of their bargaining representatives. Specifically, § 504(a) of the Labor-Management Reporting and Disclosure Act of 1959 generally prohibits persons convicted of specified crimes from serving as union officers, and § 603(a) of that Act is an express disclaimer of pre-emption of state laws regulating union officials' responsibilities except where such pre-emption is expressly provided. Moreover, in approving a compact between New York and New Jersey, Congress implicitly approved New York's restrictions (similar to those involved here) on unions representing waterfront employees, which restrictions were upheld against a pre-emption challenge based on § 7 of the NLRA in *De Veau* v. *Braisted*, 363 U. S. 144. Thus, Congress apparently has concluded that, at least where the States are confronted with the public evils of crime, corruption, and racketeering, more stringent state regulation of the qualifications of union officials is not incompatible with the national labor policy as embodied in § 7. Pp. 503–510.

3. The issue whether the dues collection sanction authorized by § 93 of the New Jersey Act to effect the removal of disqualified union officials abridges the employees' separate rights under § 7 of the NLRA to organize, and thus is pre-empted, cannot be decided now because of the procedural posture of this litigation. Appellees' factual allegations as to this issue were never addressed by the courts below. On remand, the

District Court should make the requisite findings of fact to determine whether imposition of the dues collection ban will so incapacitate appellee union as to prevent it from performing its functions as the employees' chosen bargaining agent. Also, the issue of the validity of § 93's second sanction—prohibition of a union's administration of its pension or welfare funds—cannot be decided now, despite the Court of Appeals' holding that the sanction is expressly pre-empted by provisions of the Employee Retirement Income Security Act. Because the state agency never imposed this sanction on appellee union, no concrete application of state law is presented, and the issue is hence not ripe for review. Pp. 510–512.

709 F. 2d 815, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which POWELL and STEVENS, JJ., joined, *post*, p. 513. BRENNAN and MARSHALL, JJ., took no part in the decision of the cases.

*Anthony J. Parrillo*, Assistant Attorney General of New Jersey, argued the cause for appellants. With him on the briefs for appellants in No. 83–498 were *Irwin I. Kimmelman*, Attorney General, and *Gary A. Ehrlich* and *Eugene M. Schwartz*, Deputy Attorneys General. *Robert J. Genatt* and *John R. Zimmerman* filed briefs for appellants in No. 83–573.

*Laurence Gold* argued the cause for appellees. With him on the brief were *Bernard N. Katz*, *Michael N. Katz*, and *George Kaufmann*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1976, the citizens of New Jersey amended their State Constitution to permit the legislative authorization of casino gambling within the municipality of Atlantic City.[1] Determined to prevent the infiltration of organized crime into its nascent casino industry and to assure public trust in the industry's integrity, the New Jersey Legislature enacted the Casino Control Act (Act), N. J. Stat. Ann. § 5:12-1 *et seq.* (West Supp. 1983-1984), which provides for the comprehensive regulation of casino gambling, including the regulation of unions representing industry employees. Sections 86 and 93 of the Act specifically impose certain qualification criteria on officials of labor organizations representing casino industry employees. Those labor organizations with officials found not to meet these standards may be prohibited from receiving dues from casino industry employees and prohibited from administering pension and welfare funds. The principal question presented by these cases is whether the National Labor Relations Act (NLRA), as amended, 29 U. S. C. § 141 *et seq.*, precludes New Jersey from imposing these criteria on those whom casino industry employees may select as officials of their bargaining representatives. We hold that it does not.

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†*Brian McKay*, Attorney General, filed a brief for the State of Nevada as *amicus curiae* urging reversal.

*David Previant* and *Robert M. Baptiste* filed a brief for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Atlantic City Casino Hotel Association et al. by *William F. Kaspers;* and for the National Right to Work Legal Defense Foundation by *Rex H. Reed* and *Glenn M. Taubman*.

## I

### A

The advent of casino gambling in New Jersey was heralded with great expectations for the economic revitalization of the

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[1] That amendment provides in part:

"It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, . . . and to license and tax such operations and equipment used in connection therewith. Any law authorizing the establishment and operation of such gambling establishments shall provide for the State revenues derived therefrom to be applied solely for the purpose of providing reductions in property taxes, rentals, telephone, gas, electric, and municipal utilities charges of, eligible senior citizens and disabled residents of the State . . . ." N. J. Const., Art. 4, § 7, ¶ 2D.

A subsequent amendment permits revenues to be used as well to provide health and transportation benefits for eligible senior citizens and disabled residents. *Ibid.*

Atlantic City region, but with equally great fears for the potential for infiltration by organized crime. The state legislature conducted extensive hearings and, in cooperation with the Governor, commissioned numerous studies on how best to prevent infiltration by organized crime into the casino industry.[2] These studies confirmed the fact that the vast amount of money that flows daily through a casino operation and the large number of unrecorded transactions make the industry a particularly attractive and vulnerable target for organized crime. The New Jersey Commission of Investigation (NJCI), for example, found that there was a "well-organized highly functional organized crime network in [New Jersey]" which had become more interested in investing funds in legitimate enterprises.[3] The NJCI feared that such an incursion by organized crime into the Atlantic City casinos might also be accompanied by extortion, loansharking, commercial bribery, and tax and antitrust violations. It was on the basis of these hearings and empirical studies that New Jersey finally adopted the Act, a comprehensive statutory scheme that authorizes casino gambling and establishes a rigorous system of regulation for the entire casino industry.

In order to promote "public confidence and trust in the credibility and integrity of the regulatory process and of casino operations," the Act "extend[s] strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries." N. J. Stat. Ann. § 5:12–1(b)(6) (West Supp. 1983–1984). The Casino Control Commission (Commission), an independent administrative body, possesses broad regulatory authority over the casinos and other related industries, §§ 5:12–63 to 5:12–75. The Division of Gaming Enforcement (Division), a part of the Attorney General's Office, is charged with the responsibility for investigating license and permit applicants and for prosecuting violators of the Act, §§ 5:12–76 to 5:12–79.

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[2] See generally Cohen, The New Jersey Casino Control Act: Creation of a Regulatory System, 6 Seton Hall Legis. J. 2–5 (1982); Note, The Casino Act: Gambling's Past and the Casino Act's Future, 10 Rutgers-Camden L. J. 279 (1979).

[3] See NJCI, Report and Recommendations on Casino Gambling 1C–2C (1977). Most relevant to these cases, this study specifically noted:

"[E]xperience and collected intelligence regarding organized crime strongly suggests *[sic]* that there are few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures." *Id.*, at 1–H.

The Act imposes strict licensing requirements on any business seeking to own and operate a casino hotel, §§ 5:12–84(a)–(c); on suppliers of goods and services to casino hotels, §§ 5:12–12, 5:12–92; on all supervisory employees involved in casino operations, §§ 5:12–9, 5:12–89; and on all employees with access to the casino floor, §§ 5:12–7, 5:12–90. The Act requires registration, rather than licensing, for employees of casino hotels. Casino hotel employees include those performing "service or custodial duties not directly related to operations of the casino, including, without limitation, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." § 5:12–8. Most relevant to this litigation, § 93(a) of the Act also requires labor organizations that represent or seek to represent persons employed in casinos or casino hotels to register annually with the Commission, § 5:12–93(a).

All those entities and persons required to be licensed or registered are subject to the disqualification criteria set forth in § 86 of the Act. Section 86 specifically lists criteria for the disqualification of casino licensees. The Commission is authorized to revoke, suspend, limit, or otherwise restrict the registration of any casino hotel employees who would be disqualified for a casino license. N. J. Stat. Ann. §§ 5:12–86, 5:12–91(b) (West Supp. 1983–1984). All industries offering goods or services to the casinos are also subject to the disqualification criteria of § 86. § 5:12–92.

Section 93(b) directly subjects registered labor organizations to the § 86 disqualification criteria and imposes two express penalties for noncompliance:

> "No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require."

The disqualification criteria referred to in § 86 include convictions for a list of enumerated offenses or "any other offense which indicates that licensure of the applicant would be inimical to the policy of this act and to casino operations." N. J. Stat. Ann. § 5:12–86(c)(4) (West Supp. 1983–1984). Disqualification may also result if an individual is identified "as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations." § 5:12–86(f).[4]

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[4] A "career offender," in turn, is defined as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State." N. J. Stat. Ann. § 5:12–86(f) (West Supp. 1983–1984).

## B

Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54) is an unincorporated labor organization within the meaning of § 2(5) of the NLRA, 29 U. S. C. § 152(5). Local 54 represents in collective bargaining approximately 12,000 employees, 8,000 of whom are employed in casino hotels in Atlantic City. All of Local 54's casino hotel employees work in traditional hotel and restaurant service-related positions; none are employed in direct gambling operations. Appellee Frank Gerace is the president of Local 54.

In 1978, Local 54 began filing with the Commission the annual registration statement required by § 93(a) of the Act. Following a lengthy investigation, the Division in 1981 reported to the Commission that, in its view, Local 54's President Gerace, Secretary-Treasurer Robert Lumio, and Grievance Manager Frank Materio were disqualified under the criteria of § 86. Pursuant to that section, the Commission scheduled a hearing on the Division's allegations. When Local 54 raised objections to the constitutionality of § 86 and § 93, the Commission ruled that it lacked the authority to consider such challenges to its enabling statute. In response, appellees filed a complaint in District Court,[5] seeking declaratory and injunctive relief on the grounds that § 86 and § 93 impermissibly regulate areas which are preempted by the NLRA, the Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1001 *et seq.*, and the Labor-Management Reporting and Disclosure Act of 1959

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[5] Defendants in that action, now appellants before this Court, included G. Michael Brown, the Director of New Jersey's Department of Law and Public Safety, Division of Gaming Enforcement; the Division itself; and Thomas Kean, Governor of New Jersey. These appellants filed an appeal in No. 83–498, and are referred to collectively as appellant Division. Also defendants below were Martin Danziger, Acting Chairman of the Commission, along with the other members constituting the Commission. These appellants are referred to as appellant Commission, and their appeal, No. 83–573, has been consolidated with No. 83–498.

(LMRDA), 29 U. S. C. § 401 *et seq.*, and that § 86(f) violates the Constitution because it is both overbroad and vague. Appellees also filed a motion for preliminary injunctive relief alleging irreparable injury from being forced to participate in further Commission proceedings.

After a hearing, the District Court denied the motion for a preliminary injunction, concluding that appellees were unlikely to succeed on the merits of their claims.[6] 536 F. Supp. 317 (NJ 1982). Since no preliminary injunction was entered, the Commission went forward with its disqualification hearing. The Commission concluded that Gerace and Materio were disqualified under § 86(f) because they were associated with members of organized crime in a manner inimical to the policy of the Act and to gaming operations. Local 54's Business Agent, Karlos LaSane, was also held disqualified under § 86(c) because he had been convicted in 1973 of extortion from persons doing business with Atlantic City while he was a City Commissioner.[7] On the basis of its findings, the Commission ordered that these individuals be removed as officers, agents, or principal employees of Local 54, failing which Local 54 would be barred from collecting dues from any of its members who were licensed or registered employees under the Act. See App. to Juris. Statements 206a–207a. The Commission later issued a supplemental decision, determining that the prohibition against dues collection would suffice to effectuate the removal of the three union officials and that it was therefore unnecessary to invoke the additional sanction of prohibiting the disqualified officials from administering pension and welfare funds. *Id.*, at 208a–215a.

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[6] Appellants had in turn moved to dismiss the complaint on abstention grounds, relying on the various strands of that doctrine as enunciated in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); and *Younger* v. *Harris*, 401 U. S. 37 (1971). The District Court concluded that none of these abstention doctrines was applicable to this case. 536 F. Supp. 317, 324–325 (NJ 1982).

[7] One of the officials earlier identified in the Division's report, Secretary-Treasurer Lumio, died in June 1981, prior to the Commission's decision.

Subsequent to the Commission's decision, a divided panel of the United States Court of Appeals for the Third Circuit issued a ruling concluding that the District Court had erred in refusing to grant the preliminary injunction. 709 F. 2d 815 (1983). Reaching the merits of the underlying complaint, the court decided that § 93 of the Act is pre-empted by § 7 of the NLRA insofar as it empowers the Commission to disqualify elected union officials and is pre-empted by ERISA insofar as it empowers the Commission to prohibit administration of pension and welfare funds.[8]

We noted probable jurisdiction, and consolidated the separate appeals of the Commission and the Division to consider the pre-emption issue, 464 U. S. 990 (1983).[9]

## II

When federal pre-emption is invoked under the directive of the Supremacy Clause, it falls to this Court to examine the presumed intent of Congress. See *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982).

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[8] The Court of Appeals also concluded that the District Court was correct in declining to abstain. Because its decision on the NLRA and ERISA pre-emption issues sufficed to dispose of the appeal, the Court of Appeals had no occasion to pass on Local 54's overbreadth and vagueness contentions, nor do we. Local 54 did not challenge on appeal the District Court's decision that LMRDA does not pre-empt the sanctions provided by the Act.

[9] As a preliminary matter, we note appellant Commission's contention that, despite the decision below, the case should still be dismissed under the abstention doctrine of *Younger* v. *Harris*, *supra*. The New Jersey Attorney General—representing appellants Division, its Director, and the Governor—does not, however, press the *Younger* abstention claim before this Court, and instead submits to the jurisdiction of this Court in order to obtain a more expeditious and final resolution of the merits of the constitutional issue. Brief for Appellant Division 14, n. 6. Since the State's Attorney General has thereby agreed to our adjudication of the controversy, considerations of comity are not implicated, and we need not address the merits of the *Younger* abstention claim. See *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 480 (1977).

Our task is quite simple if, in the federal enactment, Congress has explicitly mandated the pre-emption of state law, see *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95–100 (1983), or has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Even in the absence of such express language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See *Michigan Canners & Freezers Assn., Inc.* v. *Agricultural Marketing and Bargaining Board*, 467 U. S. 461, 469 (1984); *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, *supra*.

These pre-emption principles are no less applicable in the field of labor law. Section 7 of the NLRA, 49 Stat. 452, as amended, 29 U. S. C. § 157, the provision involved in this case, neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field of labor-management relations. See *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519, 540 (1979); *Garner* v. *Teamsters*, 346 U. S. 485, 488 (1953) ("The national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much"). The Court has, however, frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7. If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.

See, *e. g.*, *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235, 239–240 (1967) (invalidating state unemployment compensation law); *Bus Employees* v. *Missouri*, 374 U. S. 74, 81–82 (1963) (striking down state statute prohibiting peaceful strikes against public utilities); *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 394 (1951) (same); *Automobile Workers* v. *O'Brien*, 339 U. S. 454, 458–459 (1950) (invalidating state "strike-vote" legislation).

Appellants argue that the appropriate framework for preemption analysis in these cases is the balancing test applied to those state laws which fall within the so-called "local interests" exception to the pre-emption doctrine first set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243–244 (1959). They contend that because New Jersey's interest in crime control is "so deeply rooted in local feeling and responsibility," *ibid.*, the Act may yet be sustained as long as the magnitude of the State's interest in the enactment outweighs the resulting substantive interference with federally protected rights. See *Operating Engineers* v. *Jones*, 460 U. S. 669, 683 (1983). This argument, however, confuses pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board (NLRB). See, *e. g.*, *Railroad Trainmen* v. *Terminal Co.*, 394 U. S. 369, 383, n. 19 (1969). In the latter situation, a presumption of federal pre-emption applies even when the state law regulates conduct only arguably protected by federal law. Such a pre-emption rule avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 286–289 (1971); *San Diego Building Trades Council* v. *Garmon*, *supra*, at 244–245. This presumption of federal pre-emption, based on the primary jurisdiction rationale, properly admits to exception when unusually "deeply rooted" local interests are at stake. In such cases, appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters. We have, therefore, refrained from finding that the NLRA pre-empts state court jurisdiction over state breach of contract actions by strike replacements, *Belknap, Inc.* v. *Hale*, 463 U. S. 491 (1983), state trespass actions, *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978), or state tort remedies for intentional infliction of emotional distress, *Farmer* v. *Carpenters*, 430 U. S. 290 (1977).

If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). We turn, therefore, to consider whether New Jersey's Act actually conflicts with the casino industry employees' § 7 rights.

## III

Section 7 guarantees to employees various rights, among them the right "to bargain collectively through representatives of their own choosing." 29 U. S. C. § 157. In a straightforward analysis, the Court of Appeals found that this express right of employees to choose their collective-bargaining representatives encompasses an unqualified right to choose the officials of these representatives. Because § 93(b) of the Act precludes casino industry employees from selecting as union officials individuals who do not meet the § 86 disqualification criteria, the Court of Appeals determined that this provision clearly and directly conflicts with

§ 7 and, under traditional pre-emption analysis, must be held pre-empted.

The Court of Appeals relied heavily on this Court's decision in *Hill* v. *Florida ex rel. Watson*, 325 U. S. 538 (1945), as support for the threshold proposition that § 7 confers an unfettered right on employees to choose the officials of their own bargaining representatives. *Hill* involved a Florida statute that provided for state licensing of union business agents and prohibited the licensing of individuals who had not been citizens for more than 10 years, who had been convicted of a felony, or who were not of "good moral character." The statute also required the unions to file annual reports. Pursuant to this law, the Florida Attorney General obtained injunctions against a union and its business agent, restraining them from functioning until they had complied with the statute. On review, the Court found that Florida's statute as applied conflicted with § 7, explaining:

> "The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications." 325 U. S., at 541.

The decision in *Hill* does not control the present cases, however, because Congress has, in our view, subsequently disclaimed any intent to pre-empt all state regulation which touches upon the specific right of employees to decide which individuals will serve as officials of their bargaining representatives. As originally enacted, and as interpreted by the

Court in *Hill*, § 7 imposed no restrictions whatsoever on employees' freedom to choose the officials of their bargaining representatives. In 1959, however, Congress enacted the Labor-Management Reporting and Disclosure Act (LMRDA), designed in large part to address the growing problems of racketeering, crime, and corruption in the labor movement. See S. Rep. No. 187, 86th Cong., 1st Sess., 12–16 (1959); H. R. Rep. No. 741, 86th Cong., 1st Sess., 9–12 (1959). Title V of LMRDA imposes various restrictions on labor union officials and defines certain qualifications for them. Specifically, 29 U. S. C. § 504(a) provides in pertinent part:

> "No person . . . who has been convicted of, or served any part of a prison term resulting from his conviction of [a series of enumerated crimes] shall serve . . . as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer . . . of any labor organization . . . for five years after such conviction or after the end of such imprisonment . . . ."

By enacting § 504(a), Congress has unmistakably indicated that the right of employees to select the officers of their bargaining representatives is not absolute and necessarily admits of some exception. Of course, a strong counterargument can be made that Congress intended § 504(a) to be the very measure of the exception, thereby cutting back on the pre-emptive effect of § 7 only to that extent and no more. Although this is certainly a conceivable reading of congressional intent, we are, however, not persuaded by it.

As the Court has already recognized, another provision of LMRDA, § 603(a),[10] is "an express disclaimer of pre-emption

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[10] Section 603(a), as set forth in 29 U. S. C. § 523(a), provides:

"Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer . . . under any other Federal law or under the laws of any State, and, ex-of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided . . . ." *De Veau* v. *Braisted*, 363 U. S. 144, 157 (1960) (plurality opinion); see also *id.*, at 160–161 (BRENNAN, J., concurring in judgment) (LMRDA "explicitly provides that it shall not displace such legislation of the States").[11] In affirmatively preserving the operation of state laws, § 603(a) indicates that Congress necessarily intended to preserve *some* room for state action concerning the responsibilities and qualifications of union officials. Moreover, § 504 itself makes clear that Congress did not seek to impose a uniform federal standard on those who may serve as union officials. An individual is disqualified from holding office for five years under § 504 only if he has been convicted of certain state law crimes. His eligibility for union office may be restored earlier depending on the various state laws providing for the restoration of citizen rights to convicted felons. See 104 Cong. Rec. 10991–10994 (1958) (remarks of Sen. McNamara). Thus, the federal law's disqualification criteria themselves are premised on state laws which of course vary throughout the Nation. Finally, our conclusion that Congress might not view such state regulation as necessarily interfering with national labor policy is buttressed by consideration of the concerns that led Congress to enact LMRDA in the first place. Congress was prompted to take action in large part because the governmental machinery was not "effective in policing specific abuses at the local level" and in "stamp[ing] out crime and corruption [in

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cept as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State." See also 29 U. S. C. § 524 (separate "saving clause" which explicitly preserves state authority to enforce general criminal laws).

[11] It was upon the authority of *De Veau* that the District Court in the instant cases rejected appellees' argument that § 93 of the Act was directly pre-empted by LMRDA. See 536 F. Supp., at 326–328. Appellees no longer press this contention.

unions]." S. Rep. No. 187, *supra*, at 6. Consistent with this overarching legislative purpose, we can more readily presume that Congress would allow a State to adopt different and more stringent qualification requirements for union officials to effectuate this important goal.

In *De Veau* v. *Braisted*, *supra*, this Court first squarely confronted the issue of post-*Hill* congressional intent in the context of a challenge to § 8 of the New York Waterfront Commission Act. The New York statute prohibited any labor organization representing waterfront employees from collecting dues if any of its officers or agents had been convicted of a felony and had not subsequently been pardoned or cleared by the parole board. The statute had been enacted in furtherance of an interstate compact betweeen New York and New Jersey, establishing a bistate commission intended to combat crime and corruption on the States' mutual waterfront. The compact had been expressly approved by Congress pursuant to Art. I, § 10, of the Federal Constitution. The argument urged upon the Court was that the New York statute was pre-empted by § 7 of the NLRA as conflicting with *Hill*'s guarantee of "complete freedom of choice in the selection of [waterfront employees'] representatives." 363 U. S., at 152. In an opinion for a four-Justice plurality, Justice Frankfurter rejected this pre-emption argument and upheld the challenged statute.

The plurality opinion began by noting that the NLRA "does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing.'" *Ibid.* The plurality reasoned:

> "It would misconceive the constitutional doctrine of preemption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heed-

> less of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in § 8 of the New York Waterfront Commission Act. *Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialetically plausible, of that policy?"* *Id.*, at 153 (emphasis added).

After thus framing the inquiry, the plurality concluded that the Court need not in fact "imaginatively summon" a hypothetical congressional response since, in light of Congress' express approval of the compact, federal pre-emption could not be found. *Ibid.*

*DeVeau*'s direct relevance for these cases lies less in its approach to determining § 7's pre-emptive scope than in its focus on the indicia of congressional intent that can be garnered from Congress' approval of the compact. At congressional hearings, labor union officials testified against the compact's ratification on the specific ground that the New York statute conflicted with federal labor policy and that approval of the compact would therefore appear to sanction all such state restrictions. See 363 U. S., at 151 (citing to testimony of International Longshoremen's Association). In approving the compact over such objections, Congress apparently concluded that, at least where the States were confronted with the "public evils"[12] of "crime, corruption, and racketeering,"[13] more stringent state regulation of the qualifications of union officials was not incompatible with the national labor policy as embodied in § 7.[14]

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[12] H. R. Rep. No. 998, 83d Cong., 1st Sess., 1 (1953).

[13] *Ibid.* See also S. Rep. No. 583, 83d Cong., 1st Sess., 1–2 (1953).

[14] In recommending approval of the compact, the House Judiciary Committee distinguished between state laws directed specifically at labor-

In short, given Congress' intent as expressed in its enactment of LMRDA and its approval of the bistate compact at issue in *De Veau,* it can no longer be maintained that § 7 necessarily and obviously conflicts with every state regulation that may restrict the right of employees to select certain individuals to serve as the officials of their bargaining representatives. Nor can we find that New Jersey's imposition of its disqualification criteria in any way "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S., at 67. In its enactment of LMRDA and its awareness of New York's comparable restrictions when approving the bistate compact, Congress has at least indicated both that employees do not have an unqualified right to choose their union officials and that certain state disqualification requirements are compatible with § 7. This is particularly true in the case of New Jersey's disqualification criteria, the purpose of which is identical to that which motivated those New York restrictions implicitly approved by Congress: Both statutes form part of comprehensive programs designed to "vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." *DeVeau* v. *Braisted, supra,* at 155. In the absence of a more specific congressional intent to the contrary, we therefore conclude that New Jersey's regulation of the qualifications of casino industry union officials does not actually conflict with § 7 and so is not pre-empted by the NLRA.

We emphasize that this conclusion does not implicate the employees' express § 7 right to select a particular labor union as their collective-bargaining representative, but only their subsidiary right to select the officials of that union organization. While the Court in *Hill* v. *Florida ex rel. Watson,*

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management relations and those state laws directed at entirely separate problems: "The compact to which the committee here recommends that Congress grant its consent is in no sense antilabor legislation, but rather, antiracketeering legislation." H. R. Rep. No. 998, *supra,* at 6.

apparently assumed that the two rights were undifferentiated and equally protected, our reading of subsequent legislative action indicates that Congress has since distinguished between the two and has accorded less than absolute protection to the employees' right to choose their union officials. In this litigation, the casino industry employees' freedom in the first instance to select Local 54 to represent them in collective bargaining is simply not affected by the qualification criteria of New Jersey's Act.

## IV

Although the NLRA does not preclude § 93(b)'s imposition of qualification standards on casino industry union officials,[15] also at issue is the separate validity of that provision's dues collection ban imposed by the Commission to effect the removal of these disqualified persons from their union positions. As in *Hill* v. *Florida ex rel. Watson*, a sanction for noncompliance with an otherwise valid state regulation must, for pre-emption purposes, be assessed independently in terms of its potential conflict with the federal enactment. The Court in *Hill* concluded that Florida's filing requirement, while itself unobjectionable, could not be enforced by an injunction against the union's "functioning as a labor union" without contravening the NLRA. See 325 U. S., at 543. Appellees vigorously contend that imposition of the § 93(b)'s dues collection sanction will similarly prohibit Local 54 from functioning as the employees' bargaining representative, thereby directly abridging the employees' separate § 7 rights to organize and bargain collectively. According to affidavits submitted in the District Court, 85% of Local 54's monthly income comes from membership dues paid by casino hotel employees. Without these payments, Local 54 claims that it could no longer process employee grievances, administer collective-bargaining agreements, bargain for new agreements, organize the unorganized, or perform the other responsibilities of a collective-bargaining agent. See Brief for Appellees 23–24, and n. 11.

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[15] We note that there is apparently no challenge to § 93(a)'s separate requirement that each labor organization seeking to represent casino hotel employees must register with the Commission annually, and must disclose the names of its officers, agents, affiliated organizations, and pension and welfare funds. Appellees have not shown that this requirement of registration imposes any burden on them. Indeed, they effectively concede that this § 93(a) requirement standing alone presents no conflict with federal law on the authority of *Hill* v. *Florida ex rel. Watson*. See 325 U. S., at 543 (finding that the filing requirement "in and of itself" does not conflict with the NLRA). See Brief for Appellees 20–21.

Unfortunately, because of the procedural posture of this litigation, we cannot decide this issue. Appellees' factual allegations were never addressed by the District Court and the Court of Appeals. We are thus confronted with a situation comparable to that presented in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), in which the Court declined to decide whether the NLRA pre-empted a state filing requirement for unions because the statute had not been "construed to operate . . . by its penal sanctions . . . to prevent [the unions] . . . from functioning within the state for non-compliance . . ." *Id.*, at 466. We follow the same course here, and remand so that the District Court can make the requisite findings of fact to determine whether imposition of the dues collection ban will so incapacitate Local 54 as to prevent it from performing its functions as the employees' chosen collective-bargaining agent.

We observe that even a finding that § 7 prohibits imposition of the dues collection sanction need not imply that New Jersey's disqualification standards are not otherwise enforceable by the Commission. The Act, for example, apparently grants broad powers to the Commission to impose sanctions directly on disqualified persons and to limit or restrict a labor organization's registration. See N. J. Stat. Ann. § 5:12–64 (West Supp. 1983–1984). The Act also provides that the Commission "may exercise any proper power or authority necessary to perform the duties assigned to it by law," and that "no specific enumeration of powers in this act shall be read to limit the authority of the commission to administer this act." § 5:12-75. The Commission itself has implicitly construed the Act as granting it the statutory authority to fashion different and less severe sanctions than those expressly enumerated in § 93(b). See App. to Juris. Statements 206a; 536 F. Supp., at 330. If the Commission has correctly interpreted state law, an issue we of course do not decide, it could then enforce § 93(b)'s disqualification criteria by numerous other means.

Finally, we also decline to reach the validity of § 93(b)'s second sanction—prohibition of a union's administration of its pension or welfare funds—despite the Court of Appeals' unanimous holding that the sanction is expressly pre-empted by § 514(a) of ERISA, 29 U. S. C. § 1144(a). In its supplemental decision, the Commission asserted its general authority to impose this sanction on Local 54, but, exercising its broad discretion, chose not to do so at that time. That decision rested both on the Commission's assumption that the dues collection sanction alone would suffice to ensure Local 54's compliance with the disqualification order and on its determination that it lacked adequate information as to whether Local 54 in fact administers pension and welfare funds within the meaning of § 93(b) as well as to the manner in which such a prohibition might impact the membership. See App. to Juris. Statements 214a; *supra*, at 499. Because the Commission never imposed this sanction on Local 54, we are presented with no concrete application of state law. The issue is hence not ripe for review, and the Court of Appeals' holding that the federal ERISA pre-empts this sanction must therefore be vacated. See, *e. g.*, *Longshoremen* v. *Boyd*, 347 U. S. 222, 224 (1954).

## V

We find that § 93 of New Jersey's Act is not pre-empted by § 7 of the NLRA to the extent that it imposes certain limitations on whom casino industry employees may choose to serve as officials of their bargaining representatives. On remand, the District Court should determine whether imposition of § 93(b)'s sanction of prohibiting the collection of dues from casino industry employees will effectively prevent the union from performing its statutory functions as bargaining representative for its members. The judgment of the Court of Appeals is therefore vacated, and the cases are remanded to the Court of Appeals with instructions to remand to the District Court for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BRENNAN and JUSTICE MARSHALL took no part in the decision of these cases.

JUSTICE WHITE, with whom JUSTICE POWELL and JUSTICE STEVENS join, dissenting.

Section 93(b) of the New Jersey Casino Control Act restricts the activities of unions representing workers employed in the casino industry. In particular, it provides that a union may not collect dues from casino workers or administer pension or welfare funds if any of its officials is disqualified under the criteria set forth in § 86. The Court purports to save some portion of this statute[1] by holding that a state law restricting the class of individuals who can serve as officers in a union is not pre-empted by federal labor law. If § 93(b) did no more than that, I would agree with the Court's resolution of these cases because, as the Court amply demonstrates, Congress' actions in enacting the LMRDA indicate that federal labor law does not pre-empt state laws which prevent certain types of individuals from serving as union officials.[2] However, § 93(b) is not directed at the individuals who are disqualified under § 86. It imposes sanctions on the union itself and, in so doing, infringes on the employees' federally protected rights.

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[1] It is not clear what portion of the statute the Court upholds since it expressly refuses to decide whether the dues prohibition and fund administration provisions are valid. Section 93(b) does nothing more than impose those two restrictions on unions whose officials are disqualified under the criteria set forth in § 86. It does not, by its terms, provide a mechanism for disqualifying any union officer. Therefore, while it appears that the Court holds that a State is free to disqualify certain individuals from acting as union officials as long as it does not impose sanctions on the union itself, it is not clear that anything in § 93(b) enables the State to do that.

Section 7 of the NLRA grants covered employees the right "to bargain collectively through representatives of their own choosing." 29 U. S. C. § 157.[3] A bargaining representative achieves this status by being "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U. S. C. § 159(a). The employees' right to exercise this right is protected from employer, 29 U. S. C. § 158(a)(1), labor organization, 29 U. S. C. § 158(b)(1), and state, *Hill* v. *Florida ex rel. Watson,* 325 U. S. 538 (1945), interference. The employees whose rights are involved in these cases have exercised this right by selecting Local 54 as their bargaining representative.[4] The State, acting pursuant to § 93(b), has sought to prohibit Local 54 from collecting dues from these employees, thereby effectively preventing the union from carrying out the collective-bargaining function and nullifying the employees' exercise of their § 7 right.

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[2] If these cases required us to determine whether New Jersey could enforce the limits in § 86 by imposing sanctions directly against the disqualified individual, for example by imposing fines or criminal penalties on those who hold union office after being disqualified, I would hold that it could. Section 93(b) does not purport to do that, however, and it is that statute which we are asked to review.

[3] The Court correctly recognizes that there is a fundamental difference between the employees' absolute § 7 right to choose which labor organization will act as their bargaining representative and their less absolute right to determine who will serve as officers in that organization. One need only examine the actual workings of most unions in order to realize that the two rights are not coextensive. For example, while a nonunion employee in an agency shop retains his § 7 right to participate in the selection of the bargaining representative, he often has no say in who will serve as officers of the union that represents him in the bargaining process since such decisions are generally made by union members only. Similarly, while only the members of a particular collective-bargaining unit are empowered to decide which union will act as their bargaining representative, all members of the union, even those not in the particular bargaining unit, are generally free to participate in the process of electing union officials. Thus, in a large union, it is possible that a substantial majority of the members of a particular bargaining unit may vote against the union official who is eventually elected. Even though the members of the bargaining unit are unable to select the union official of their choice in such situations, there would be no legitimate claim that this somehow interfered with their § 7 right to bargain through the representative of their choice.

In *Hill* v. *Florida ex rel. Watson,* the Court held that federal labor policy prohibits a State from enforcing permissible regulations by the use of sanctions that prevent the union "from functioning as a labor union." *Id.*, at 543. Allowing the State to so restrict the union's conduct infringes on the employees' right to bargain collectively through the representative of their own choosing because it prevents that representative from functioning as a collective-bargaining agent. The same effect would occur if New Jersey were to enjoin Local 54 from collecting dues from employees in the casino industry. A union which cannot sustain itself financially obviously cannot effectively engage in collective-bargaining activities on behalf of its members. Unlike the Court, I see no need to remand these cases in order to determine whether, as a factual matter, Local 54 is so dependent on dues that it will be prevented from effectively functioning as a bargaining representative if that source of revenue is cut off. I am willing to hold that, as a matter of law, a statute like § 93(b), which prohibits a union from collecting dues from its members, impairs the union's ability to represent those members to such an extent that it infringes on their § 7 right to bargain through the representative of their choice. Since the Court refuses to strike down the statute on this ground, I respectfully dissent.

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[4] Under the NLRA, an individual, as well as a labor organization, can serve as the exclusive bargaining representative. 29 U. S. C. § 152(4). See *Louisville Sanitary Wiper Co.,* 65 N. L. R. B. 88 (1945); *Robinson-Ransbottom Pottery Co.,* 27 N. L. R. B. 1093 (1940). The employees whose interests are at stake in these cases have chosen a union (Local 54), rather than an individual, as their bargaining representative.

# HUDSON *v.* PALMER

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82-1630. Argued December 7, 1983—Decided July 3, 1984*

Respondent, an inmate at a Virginia penal institution, filed an action in Federal District Court under 42 U. S. C. § 1983 against petitioner, an officer at the institution, alleging that petitioner had conducted an unreasonable "shakedown" search of respondent's prison locker and cell and had brought a false charge, under prison disciplinary procedures, of destroying state property against respondent solely to harass him; and that, in violation of respondent's Fourteenth Amendment right not to be deprived of property without due process of law, petitioner had intentionally destroyed certain of respondent's noncontraband personal property during the search. The District Court granted summary judgment for petitioner, and the Court of Appeals affirmed with regard to the District Court's holding that respondent was not deprived of his property without due process. The Court of Appeals concluded that the decision in *Parratt* v. *Taylor*, 451 U. S. 527—holding that a negligent deprivation of a prison inmate's property by state officials does not violate the Due Process Clause of the Fourteenth Amendment if an adequate postdeprivation state remedy exists—should extend also to intentional deprivations of property. However, the Court of Appeals reversed and remanded with regard to respondent's claim that the "shakedown" search was unreasonable. The court held that a prisoner has a "limited privacy right" in his cell entitling him to protection against searches conducted solely to harass or to humiliate, and that a remand was necessary to determine the purpose of the search here.

*Held:*

1. A prisoner has no reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches. While prisoners enjoy many protections of the Constitution that are not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration, imprisonment carries with it the circumscription or loss of many rights as being necessary to accommodate the institutional needs and objectives of prison facilities, particularly internal security and safety. It would be impossible

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*Together with No. 82-6695, *Palmer* v. *Hudson*, also on certiorari to the same court.

to accomplish the prison objectives of preventing the introduction of weapons, drugs, and other contraband into the premises if inmates retained a right of privacy in their cells. The unpredictability that attends random searches of cells renders such searches perhaps the most effective weapon of the prison administrator in the fight against the proliferation of weapons, drugs, and other contraband. A requirement that random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. Pp. 522–530.

2. There is no merit to respondent's contention that the destruction of his personal property constituted an unreasonable *seizure* of that property violative of the Fourth Amendment. Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere seizure, the same reasons that lead to the conclusion that the Amendment's proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to seizures. Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests. P. 528, n. 8.

3. Even if petitioner intentionally destroyed respondent's personal property during the challenged "shakedown" search, the destruction did not violate the Due Process Clause of the Fourteenth Amendment since respondent had adequate postdeprivation remedies under Virginia law for any loss suffered. The decision in *Parratt* v. *Taylor*, *supra*, as to negligent deprivation by a state employee of a prisoner's property—as well as its rationale that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are "impracticable" since the state cannot know when such deprivations will occur—also applies to intentional deprivations of property. Both the District Court and, at least implicitly, the Court of Appeals held that several common-law remedies were available to respondent under Virginia law and would provide adequate compensation for his property loss, and there is no reason to question that determination. The fact that respondent might not be able to recover under state-law remedies the full amount which he might receive in a § 1983 action is not determinative of the adequacy of the state remedies. As to respondent's contention that relief under state law was uncertain because a state employee might be entitled to sovereign immunity, the courts below held that respondent's claim would not be barred by sovereign immunity, since under Virginia law a state employee may be held liable for his intentional torts. Pp. 530–536.

697 F. 2d 1220, affirmed in part and reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part II–B of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., also joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 537. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 541.

*William G. Broaddus*, Chief Deputy Attorney General of Virginia, argued the cause for petitioner in No. 82–1630 and respondent in No. 82–6695. With him on the briefs were *Gerald L. Baliles*, Attorney General, *Donald C. J. Gehring*, Deputy Attorney General, and *Peter H. Rudy*, Assistant Attorney General.

*Deborah C. Wyatt* argued the cause for respondent in No. 82–1630 and petitioner in No. 82–6695. With her on the briefs was *Leon Friedman*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in No. 82–1630 to decide whether a prison inmate has a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures. We also granted certiorari in No. 82–6695, the cross-petition, to determine whether our decision in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), which held that a negligent deprivation of property by state officials does not violate the Fourteenth Amendment if an adequate postdeprivation state remedy exists, should extend to intentional deprivations of property.

## I

The facts underlying this dispute are relatively simple. Respondent Palmer is an inmate at the Bland Correctional Center in Bland, Va., serving sentences for forgery, uttering, grand larceny, and bank robbery convictions. On September 16, 1981, petitioner Hudson, an officer at the Correctional Center, with a fellow officer, conducted a "shakedown" search of respondent's prison locker and cell for contraband. During the "shakedown," the officers discovered a ripped pillowcase in a trash can near respondent's cell bunk. Charges against Palmer were instituted under the prison disciplinary procedures for destroying state property. After a hearing, Palmer was found guilty on the charge and was ordered to reimburse the State for the cost of the material destroyed; in addition, a reprimand was entered on his prison record.

Palmer subsequently brought this *pro se* action in United States District Court under 42 U. S. C. § 1983. Respondent claimed that Hudson had conducted the shakedown search of his cell and had brought a false charge against him solely to harass him, and that, in violation of his Fourteenth Amendment right not to be deprived of property without due process of law, Hudson had intentionally destroyed certain of his noncontraband personal property during the September 16 search. Hudson denied each allegation; he moved for and was granted summary judgment. The District Court accepted respondent's allegations as true but held nonetheless, relying on *Parratt* v. *Taylor*, *supra*, that the alleged destruction of respondent's property, even if intentional, did not violate the Fourteenth Amendment because there were state tort remedies available to redress the deprivation, App. 31[1] and that the alleged harassment did not "rise to the level of a constitutional deprivation," *id.*, at 32.

The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. 697 F. 2d 1220 (CA4 1983). The court affirmed the District Court's holding that respondent was not deprived of his property without due process. The court acknowledged that we considered only a claim of negligent property deprivation in *Parratt* v. *Taylor*, *supra*. It agreed with the District Court, however, that the logic of *Parratt* applies equally to unauthorized intentional deprivations of property by state officials: "[O]nce it is assumed that a postdeprivation remedy can cure an unintentional but negligent act causing injury, inflicted by a state agent which is unamenable to prior review, then that principle applies as well to random and unauthorized intentional acts." 697 F. 2d, at 1223.[2] The Court of Appeals did not discuss the availability and adequacy of existing state-law remedies; it presumably accepted as correct the District Court's statement of the remedies available under Virginia law.[3]

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[1] The District Court determined that Palmer could proceed against Hudson in state court either for conversion or for detinue, and that under applicable Virginia law, see *Elder* v. *Holland*, 208 Va. 15, 155 S. E. 2d 369 (1967), Hudson would not be entitled to immunity for the alleged intentional tort.

The Court of Appeals reversed the summary judgment on respondent's claim that the shakedown search was unreasonable. The court recognized that *Bell* v. *Wolfish*, 441 U. S. 520, 555–557 (1979), authorized irregular unannounced shakedown searches of prison cells. But the court held that an individual prisoner has a "limited privacy right" in his cell entitling him to protection against searches conducted solely to harass or to humiliate. 697 F. 2d, at 1225.[4] The shakedown of a single prisoner's property, said the court, is permissible only if "done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband" or upon reasonable belief that the particular prisoner possessed contraband. *Id.*, at 1224. Because the Court of Appeals concluded that the record reflected a factual dispute over whether the search of respondent's cell was routine or conducted to harass respondent, it held that summary judgment was inappropriate, and that a remand was necessary to determine the purpose of the cell search.

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[2] The Court of Appeals observed that "there is no practical mechanism by which Virginia could prevent its guards from conducting personal vendettas against prisoners other than by punishing them after the fact . . . ." 697 F. 2d, at 1223.

[3] See n. 1, *supra*.

[4] Petitioner maintains that the Court of Appeals' decision rests at least in part upon a finding of an independent right of privacy for prisoners under the Fourteenth Amendment alone. Arguably, it is not entirely clear whether the Court of Appeals believed that the limited privacy right it recognized was guaranteed solely by the Fourth Amendment, and applicable to the States only through the Fourteenth Amendment, or whether the right emanated from the Fourteenth Amendment alone, or both. The court's opinion, however, explicitly speaks to the "primary purpose of the Fourth and Fourteenth Amendments," 697 F. 2d, at 1224, and nowhere does it suggest an intention to draw a distinction between the Fourth and Fourteenth Amendment right of privacy in prison cells. Under the circumstances, we assume, since there is no suggestion to the contrary, that the court did not mean to imply in this context that any right of privacy that might exist under the Fourteenth Amendment alone exceeds that which exists under the Fourth Amendment.

We granted certiorari. 463 U. S. 1206 (1983). We affirm in part and reverse in part.

## II

### A

The first question we address is whether respondent has a right of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches.[5] As we have noted, the Court of Appeals held that the District Court's summary judgment in petitioner's favor was premature because respondent had a "limited privacy right" in his cell that might have been breached. The court concluded that, to protect this privacy right, shakedown searches of an individual's cell should be performed only "pursuant to an established program of conducting random searches . . . reasonably designed to deter or discover the possession of contraband" or upon reasonable belief that the prisoner possesses contraband. Petitioner contends that the Court of Appeals erred in holding that respondent had even a limited privacy right in his cell, and urges that we adopt the "bright line" rule that prisoners have no legitimate expectation of privacy in their individual cells that would entitle them to Fourth Amendment protection.

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[5] The majority of the Courts of Appeals have held that a prisoner retains at least a minimal degree of Fourth Amendment protection in his cell. See *United States* v. *Chamorro*, 687 F. 2d 1 (CA1 1982); *United States* v. *Hinckley*, 217 U. S. App. D. C. 262, 672 F. 2d 115 (1982); *United States* v. *Lilly*, 576 F. 2d 1240 (CA5 1978); *United States* v. *Stumes*, 549 F. 2d 831 (CA8 1977); *Bonner* v. *Coughlin*, 517 F. 2d 1311 (CA7 1975) (vacating District Court judgment), on rehearing, 545 F. 2d 565 (1976) (en banc) (affirming District Court on other grounds), cert. denied, 435 U. S. 932 (1978). The Second and Ninth Circuits, however, have held that the Fourth Amendment does not apply in a prison cell. See *Christman* v. *Skinner*, 468 F. 2d 723 (CA2 1972); *United States* v. *Hitchcock*, 467 F. 2d 1107 (CA9 1972), cert. denied, 410 U. S. 916 (1973).

We have repeatedly held that prisons are not beyond the reach of the Constitution. No "iron curtain" separates one from the other. *Wolff* v. *McDonnell*, 418 U. S. 539, 555 (1974). Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. For example, we have held that invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to "prison security and discipline." *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)*. Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts. *Johnson* v. *Avery*, 393 U. S. 483 (1969).

Prisoners must be provided "reasonable opportunities" to exercise their religious freedom guaranteed under the First Amendment. *Cruz* v. *Beto*, 405 U. S. 319 (1972) *(per curiam)*. Similarly, they retain those First Amendment rights of speech "not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974). They enjoy the protection of due process. *Wolff* v. *McDonnell*, *supra; Haines* v. *Kerner*, 404 U. S. 519 (1972). And the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishments." *Estelle* v. *Gamble*, 429 U. S. 97 (1976). The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society.

However, while persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights. See *Bell* v. *Wolfish,* 441 U. S., at 545. These constraints on inmates, and in some cases the complete withdrawal of certain rights, are "justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U. S. 266, 285 (1948); see also *Bell* v. *Wolfish, supra,* at 545–546 and cases cited; *Wolff* v. *McDonnell, supra,* at 555. The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of "institutional needs and objectives" of prison facilities, *Wolff* v. *McDonnell, supra,* at 555, chief among which is internal security, see *Pell* v. *Procunier, supra,* at 823. Of course, these restrictions or retractions also serve, incidentally, as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction.

We have not before been called upon to decide the specific question whether the Fourth Amendment applies within a prison cell,[6] but the nature of our inquiry is well defined.

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[6] In *Lanza* v. *New York,* 370 U. S. 139, 143–144 (1962), a plurality of the Court termed as "at best a novel argument" the assertion that a prison "is a place where [one] can claim constitutional immunity from search or seizure of his person, his papers, or his effects." This observation, however, was plainly dictum. In fact, three Members of the Court specifically dissented from what they characterized as the Court's "gratuitous exposition of several grave constitutional issues . . . ." *Id.,* at 150 (BRENNAN, J., dissenting, joined by Warren, C. J., and Douglas, J.).

In upholding a room search rule against a Fourth Amendment challenge by pretrial detainees in *Bell* v. *Wolfish,* 441 U. S. 520 (1979), the Court acknowledged the plausibility of an argument that "a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person." *Id.,* at 556–557. However, as in *Lanza,* it was unnecessary to reach the issue of the Fourth Amendment's general

We must determine here, as in other Fourth Amendment contexts, if a "justifiable" expectation of privacy is at stake. *Katz* v. *United States*, 389 U. S. 347 (1967). The applicability of the Fourth Amendment turns on whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979), and cases cited. We must decide, in Justice Harlan's words, whether a prisoner's expectation of privacy in his prison cell is the kind of expectation that "society is prepared to recognize as 'reasonable.'" *Katz, supra*, at 360, 361 (concurring opinion).[7]

Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we

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applicability in a prison cell. We simply assumed, *arguendo*, that a pretrial detainee retained at least a "diminished expectation of privacy." 441 U. S., at 557.

[7] In *Katz*, Justice Harlan suggested that an expectation of privacy is "justifiable" if the person concerned has "exhibited an actual (subjective) expectation of privacy" and the expectation is one that "society is prepared to recognize as 'reasonable.'" 389 U. S., at 360, 361 (concurring opinion). The Court has always emphasized the second of these two requirements. As JUSTICE WHITE said, writing for the plurality in *United States* v. *White*, 401 U. S. 745 (1971): "Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. . . . Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally 'justifiable'. . . ." *Id.*, at 751–752. In the same case, even Justice Harlan stressed the controlling importance of the second of these two requirements: "The analysis must, in my view, transcend the search for subjective expectations . . . . [W]e should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." *United States* v. *White, supra*, at 768, 786 (dissenting opinion).

The Court's refusal to adopt a test of "subjective expectation" is understandable; constitutional rights are generally not defined by the subjective intent of those asserting the rights. The problems inherent in such a standard are self-evident. See, *e. g.*, *Smith* v. *Maryland*, 442 U. S., at 740–741, n. 5.

hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others. Even a partial survey of the statistics on violent crime in our Nation's prisons illustrates the magnitude of the problem. During 1981 and the first half of 1982, there were over 120 prisoners murdered by fellow inmates in state and federal prisons. A number of prison personnel were murdered by prisoners during this period. Over 29 riots or similar disturbances were reported in these facilities for the same time frame. And there were over 125 suicides in these institutions. See Prison Violence, 7 Corrections Compendium (Mar. 1983). Additionally, informal statistics from the United States Bureau of Prisons show that in the federal system during 1983, there were 11 inmate homicides, 359 inmate assaults on other inmates, 227 inmate assaults on prison staff, and 10 suicides. There were in the same system in 1981 and 1982 over 750 inmate assaults on other inmates and over 570 inmate assaults on prison personnel.

Within this volatile "community," prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors. They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize. In addition to these monumental tasks, it is incumbent upon these officials at the same time to maintain as sanitary an environment for the inmates as feasible, given the difficulties of the circumstances.

The administration of a prison, we have said, is "at best an extraordinarily difficult undertaking." *Wolff* v. *McDonnell*, 418 U. S., at 566; *Hewitt* v. *Helms*, 459 U. S. 460, 467 (1983). But it would be literally impossible to accomplish the prison objectives identified above if inmates retained a right of privacy in their cells. Virtually the only place inmates can conceal weapons, drugs, and other contraband is in their cells. Unfettered access to these cells by prison officials, thus, is imperative if drugs and contraband are to be ferreted out and sanitary surroundings are to be maintained.

Determining whether an expectation of privacy is "legitimate" or "reasonable" necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances: A prison "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza* v. *New York*, 370 U. S. 139, 143–144 (1962). We strike the balance in favor of institutional security, which we have noted is "central to all other corrections goals," *Pell* v. *Procunier*, 417 U. S., at 823. A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.[8] We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "[l]oss of freedom of choice and privacy are inherent incidents of confinement." *Bell* v. *Wolfish*, 441 U. S., at 537.

The Court of Appeals was troubled by the possibility of searches conducted solely to harass inmates; it reasoned that a requirement that searches be conducted only pursuant to an established policy or upon reasonable suspicion would prevent such searches to the maximum extent possible. Of course, there is a risk of maliciously motivated searches, and of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society. However, we disagree with the court's proposed solution. The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband. The Court of Appeals candidly acknowledged that "the device [of random cell searches] is of . . . obvious utility in achieving the goal of prison security." 697 F. 2d, at 1224.

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[8] Respondent contends also that the destruction of his personal property constituted an unreasonable *seizure* of that property violative of the Fourth Amendment. Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere seizure, the same reasons that lead us to conclude that the Fourth Amendment's proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to seizures. Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests.

That the Fourth Amendment does not protect against seizures in a prison cell does not mean that an inmate's property can be destroyed with impunity. We note, for example, that even apart from inmate grievance procedures, see n. 9, *infra*, respondent has adequate state remedies for the alleged destruction of his property. See discussion *infra*, at 534–536.

A requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. It is simply naive to believe that prisoners would not eventually decipher any plan officials might devise for "planned random searches," and thus be able routinely to anticipate searches. The Supreme Court of Virginia identified the shortcomings of an approach such as that adopted by the Court of Appeals and the necessity of allowing prison administrators flexibility:

> "For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband." *Marrero* v. *Commonwealth*, 222 Va. 754, 757, 284 S. E. 2d 809, 811 (1981).

We share the concerns so well expressed by the Supreme Court and its view that wholly random searches are essential to the effective security of penal institutions. We, therefore, cannot accept even the concededly limited holding of the Court of Appeals.

Respondent acknowledges that routine shakedowns of prison cells are essential to the effective administration of prisons. Brief for Respondent and Cross-Petitioner 7, n. 5. He contends, however, that he is constitutionally entitled not to be subjected to searches conducted only to harass. The crux of his claim is that "because searches and seizures to harass are unreasonable, a prisoner has a reasonable expectation of privacy not to have his cell, locker, personal effects, person invaded for such a purpose." *Id.*, at 24. This argument, which assumes the answer to the predicate question whether a prisoner has a legitimate expectation of privacy in his prison cell at all, is merely a challenge to the reasonableness of the particular search of respondent's cell. Because we conclude that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells, we need not address this issue.

Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against "cruel and unusual punishments." By the same token, there are adequate state tort and common-law remedies available to respondent to redress the alleged destruction of his personal property. See discussion *infra*, at 534–536.[9]

## B

In his complaint in the District Court, in addition to his claim that the shakedown search of his cell violated his Fourth and Fourteenth Amendment privacy rights, respondent alleged under 42 U. S. C. § 1983 that petitioner intentionally destroyed certain of his personal property during the search. This destruction, respondent contended, deprived him of property without due process, in violation of the Due Process Clause of the Fourteenth Amendment. The District Court dismissed this portion of respondent's complaint for failure to state a claim. Reasoning under *Parratt* v. *Taylor*,

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[9] The Commonwealth has a new inmate grievance procedure that was effective as of October 12, 1982, see n. 14, *infra*. But it appears that at the time of the alleged deprivation of respondent's property, a very similar procedure was in effect that would also have afforded respondent relief for any destruction of his property. See Reply Brief for Petitioner and Cross-Respondent 13, n. 14.

451 U. S. 527 (1981), it held that even an intentional destruction of property by a state employee does not violate due process if the state provides a meaningful postdeprivation remedy. The Court of Appeals affirmed. The question presented for our review in Palmer's cross-petition is whether our decision in *Parratt* v. *Taylor* should extend, as the Court of Appeals held, to intentional deprivations of property by state employees acting under color of state law.[10]

In *Parratt* v. *Taylor*, a state prisoner sued prison officials under 42 U. S. C. § 1983, alleging that their negligent loss of a hobby kit he ordered from a mail-order catalog deprived him of property without due process of law, in violation of the Fourteenth Amendment. The Court of Appeals for the Eighth Circuit had affirmed the District Court's summary judgment in the prisoner's favor. We reversed, holding that the Due Process Clause of the Fourteenth Amendment is not violated when a state employee negligently deprives an individual of property, provided that the state makes available a meaningful postdeprivation remedy.[11]

We viewed our decision in *Parratt* as consistent with prior cases recognizing that

> "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some

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[10] Four Circuits, including the Fourth Circuit in these cases, have held that *Parratt* extends to intentional deprivations of property. See *Wolf-Lillie* v. *Sonquist*, 699 F. 2d 864 (CA7 1983); *Engblom* v. *Carey*, 677 F. 2d 957 (CA2 1982); *Rutledge* v. *Arizona Board of Regents*, 660 F. 2d 1345 (CA9 1981), aff'd *sub nom. Kush* v. *Rutledge*, 460 U. S. 719 (1983). Three Circuits have held that it does not. *Brewer* v. *Blackwell*, 692 F. 2d 387 (CA5 1982); *Weiss* v. *Lehman*, 676 F. 2d 1320 (CA9 1982); *Madyun* v. *Thompson*, 657 F. 2d 868 (CA7 1981).

[11] Nebraska had provided respondent with a tort remedy for his alleged property deprivation. Neb. Rev. Stat. § 81-8,209 *et seq.* (1976). We held that this remedy was entirely adequate to satisfy due process, even though we recognized that it might not provide respondent all the relief to which he might have been entitled under § 1983. 451 U. S., at 543-544.

> meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process." 451 U. S., at 539 (footnote omitted).

We reasoned that where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure, the state cannot predict when the loss will occur. *Id.*, at 541. Under these circumstances, we observed:

> "It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." *Ibid.*[12]

Two Terms ago, we reaffirmed our holding in *Parratt* in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), in the course of holding that postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action.[13]

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[12] In reaching our conclusion in *Parratt*, we expressly relied on then-Judge Stevens' opinion for the Seventh Circuit in *Bonner* v. *Coughlin*, 517 F. 2d 1311 (1975), modified en banc, 545 F. 2d 565 (1976), cert. denied, 435 U. S. 932 (1978), holding that, where an individual has been negligently deprived of property by a state employee, the state's action is not complete unless or until the state fails to provide an adequate postdeprivation remedy for the property loss. 451 U. S., at 541–542.

[13] In *Logan*, we examined a claim that the terms of an Illinois statute deprived the petitioner of an opportunity to pursue his employment discrimination claim. We specifically distinguished the case from *Parratt* by noting that "*Parratt* . . . was dealing with a . . . 'random and unauthorized act by a state employee . . . [and was] not a result of some established state procedure.'" 455 U. S., at 435–436 (quoting *Parratt*, 451 U. S., at 541). *Parratt*, we said, "was not designed to reach . . . a situation" where the

While *Parratt* is necessarily limited by its facts to negligent deprivations of property, it is evident, as the Court of Appeals recognized, that its reasoning applies as well to intentional deprivations of property. The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

If negligent deprivations of property do not violate the Due Process Clause because predeprivation process is impracticable, it follows that intentional deprivations do not violate that Clause provided, of course, that adequate state postdeprivation remedies are available. Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.[14]

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deprivation is the result of an established state procedure. 455 U. S., at 436.

[14] Our holding that an intentional deprivation of property does not give rise to a violation of the Due Process Clause if the state provides an adequate postdeprivation remedy was foreshadowed by our discussion of

Respondent presses two arguments that require at least brief comment. First, he contends that, because an agent of the state who intends to deprive a person of his property "*can* provide predeprivation process, then as a matter of due process he must do so." Brief for Respondent and Cross-Petitioner 8 (emphasis in original). This argument reflects a fundamental misunderstanding of *Parratt*. There we held that postdeprivation procedures satisfy due process because the *state* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

Respondent also contends, citing to *Logan* v. *Zimmerman Brush Co.*, *supra*, that the deliberate destruction of his property by petitioner constituted a due process violation despite the availability of postdeprivation remedies. Brief for Respondent and Cross-Petitioner 8. In *Logan*, we decided a question about which our decision in *Parratt* left little doubt, that is, whether a postdeprivation state remedy satisfies due process where the property deprivation is effected pursuant to an established state procedure. We held that it does not. *Logan* plainly has no relevance here. Respondent does not even allege that the asserted destruction of his property occurred pursuant to a state procedure.

Having determined that *Parratt* extends to intentional deprivations of property, we need only decide whether the Commonwealth of Virginia provides respondent an adequate postdeprivation remedy for the alleged destruction of his property. Both the District Court and, at least implicitly, the Court of Appeals held that several common-law remedies

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*Ingraham* v. *Wright*, 430 U. S. 651 (1977), in *Parratt*. We noted that our analysis was "quite consistent" with that in *Ingraham*, a case that, we observed, involved intentional conduct on behalf of state officials. 451 U. S., at 542.

available to respondent would provide adequate compensation for his property loss. We have no reason to question that determination, particularly given the speculative nature of respondent's arguments.

Palmer does not seriously dispute the adequacy of the existing state-law remedies themselves. He asserts in this respect only that, because certain of his legal papers allegedly taken "may have contained things irreplacable *[sic]*, and incompensable" or "may also have involved sentimental items which are of equally intangible value," Brief for Respondent and Cross-Petitioner 10–11, n. 10, a suit in tort, for example, would not "necessarily" compensate him fully. If the loss is "incompensable," this is as much so under § 1983 as it would be under any other remedy. In any event, that Palmer might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not, as we have said, determinative of the adequacy of the state remedies. See *Parratt*, 451 U. S., at 544.

Palmer contends also that relief under applicable state law "is far from certain and complete" because a state court might hold that petitioner, as a state employee, is entitled to sovereign immunity. Brief for Respondent and Cross-Petitioner 11. This suggestion is unconvincing. The District Court and the Court of Appeals held that respondent's claim would not be barred by sovereign immunity. As the District Court noted, under Virginia law, "a State employee may be held liable for his intentional torts," *Elder* v. *Holland*, 208 Va. 15, 19, 155 S. E. 2d 369, 372–373 (1967); see also *Short* v. *Griffitts*, 220 Va. 53, 255 S. E. 2d 479 (1979). Indeed, respondent candidly acknowledges that it is "probable that a Virginia trial court would rule that there should be no immunity bar in the present case." Brief for Respondent and Cross-Petitioner 14.

Respondent attempts to cast doubt on the obvious breadth of *Elder* through the naked assertion that "the phrase 'may be held liable' could have meant . . . only the possibility of liability under certain circumstances rather than a blanket rule . . . ." Brief for Respondent and Cross-Petitioner 13. We are equally unpersuaded by this speculation. The language of *Elder* is unambiguous that employees of the Commonwealth do not enjoy sovereign immunity for their intentional torts, and *Elder* has been so read by a number of federal courts, as respondent concedes, see Brief for Respondent and Cross-Petitioner 13, n. 13. See, *e. g.*, *Holmes* v. *Wampler*, 546 F. Supp. 500, 504 (ED Va. 1982); *Irshad* v. *Spann*, 543 F. Supp. 922, 928 (ED Va. 1982); *Frazier* v. *Collins*, 544 F. Supp. 109, 110 (ED Va. 1982); *Whorley* v. *Karr*, 534 F. Supp. 88, 89 (WD Va. 1981); *Daughtry* v. *Arlington County, Va.*, 490 F. Supp. 307 (DC 1980).[15] In sum, it is evident here, as in *Parratt*, that the State has provided an adequate postdeprivation remedy for the alleged destruction of property.

## III

We hold that the Fourth Amendment has no applicability to a prison cell. We hold also that, even if petitioner intentionally destroyed respondent's personal property during the challenged shakedown search, the destruction did not violate the Fourteenth Amendment since the Commonwealth of Virginia has provided respondent an adequate postdeprivation remedy.

Accordingly, the judgment of the Court of Appeals reversing and remanding the District Court's judgment on respondent's claim under the Fourth and Fourteenth Amendments is reversed. The judgment affirming the District Court's decision that respondent has not been denied due process under the Fourteenth Amendment is affirmed.

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[15] It is noteworthy that the Commonwealth has enacted the State Tort Claims Act, Va. Code § 8.01–195.1 *et seq.* (Supp. 1983), which, in defined circumstances, waives sovereign immunity. Additionally, as of October 12, 1982, the State has in place an inmate grievance procedure that received the certification of the Attorney General of the United States as in compliance with the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997e. Although apparently neither of these avenues was open to this respondent, both are potential sources of relief for persons in respondent's position in the future.

*It is so ordered.*

JUSTICE O'CONNOR, concurring.

The courts of this country quite properly share the responsibility for protecting the constitutional rights of those imprisoned for the commission of crimes against society. Thus, when a prisoner's property is wrongfully destroyed, the courts must ensure that the prisoner, no less than any other person, receives just compensation. The Constitution, as well as human decency, requires no less. The issue in these cases, however, does not concern *whether* a prisoner may recover damages for a malicious deprivation of property. Rather, these cases decide only *what* is the appropriate source of the constitutional right and the remedy that corresponds with it. I agree with the Court's treatment of these issues and therefore join its opinion and judgment today. I write separately to elaborate my understanding of why the complaint in this litigation does not state a ripe constitutional claim.

The complaint alleges three types of harm under the Fourth Amendment: invasion of privacy from the search, temporary deprivation of the right to possession from the seizure, and permanent deprivation of the right to possession as a result of the destruction of the property. The search and seizure allegations can be handled together. They would state a ripe Fourth Amendment claim if, on the basis of the facts alleged, they showed that government officials had acted unreasonably. The Fourth Amendment "reasonableness" determination is generally conducted on a case-by-case basis, with the Court weighing the asserted governmental interests against the particular invasion of the individual's privacy and possessory interests as established by the facts of the case. See *Terry* v. *Ohio*, 392 U. S. 1, 17–18, n. 15 (1968). In some contexts, however, the Court has rejected the case-by-case approach to the "reasonableness" inquiry in favor of an approach that determines the reasonableness of contested practices in a categorical fashion. See, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218, 235 (1973) (searches incident to lawful custodial arrest); *Bell* v. *Wolfish*, 441 U. S. 520, 555–560 (1979) (prison room search and body cavity search rules). For the reasons stated by the Court, see *ante*, at 526–530, I agree that the government's compelling interest in prison safety, together with the necessarily ad hoc judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment. See generally LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S. Ct. Rev. 127, 141–145. The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects, see *Lanza* v. *New York*, 370 U. S. 139, 143 (1962); cf. *United States* v. *Robinson*, *supra*, at 237–238 (POWELL, J., concurring) (individual in custody retains no significant Fourth Amendment interest), and therefore all searches and seizures of the contents of an inmate's cell are reasonable.

The allegation that respondent's property was destroyed without legitimate reason does not alter the Fourth Amendment analysis in these prison cases. To be sure, the duration of a seizure is ordinarily a factor to be considered in Fourth Amendment analysis. See *United States* v. *Place*, 462 U. S. 696, 709–710 (1983). Similarly, the actual destruction of a possessory interest is generally considered in determining the reasonableness of a seizure. See *United States* v. *Jacobsen*, 466 U. S. 109, 124–125 (1984). But if the act of taking possession and the indefinite retention of the property are themselves reasonable, the handling of the property while in the government's custody is not itself of Fourth

Amendment concern. The nonprivacy interests protected by the Fourth Amendment do not extend beyond the right against unreasonable dispossessions. Since the exigencies of prison life authorize officials indefinitely to dispossess inmates of their possessions without specific reason, any losses that occur while the property is in official custody are simply not redressable by Fourth Amendment litigation.

That the Fourth Amendment does not protect a prisoner against indefinite dispossession does not mean that he is without constitutional redress for the deprivations that result. The Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests. These constitutional protections against the deprivation of private property do not abate at the time of imprisonment.

Of course, a mere allegation of property deprivation does not by itself state a constitutional claim under either Clause. The Constitution requires the government, if it deprives people of their property, to provide due process of law and to make just compensation for any takings. The due process requirement means that government must provide to the inmate the remedies it promised would be available. See *Parratt* v. *Taylor*, 451 U. S. 527, 537–544 (1981). Concomitantly, the just compensation requirement means that the remedies made available must adequately compensate for any takings that have occurred. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016–1020 (1984). Thus, in challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate. See *Parratt* v. *Taylor*, *supra*, at 537–544. When adequate remedies are provided and followed, no uncompensated taking or deprivation of property without due process can result.

This synthesis of the constitutional protections accorded private property corresponds, I believe, with both common sense and common understanding. When a person is arrested and incarcerated, his personal effects are routinely "searched," "seized," and placed in official custody. See *Illinois* v. *Lafayette*, 462 U. S. 640, 643–647 (1983); *United States* v. *Edwards*, 415 U. S. 800, 804–807 (1974). Such searches and seizures are necessary both to protect the detainee's effects and to maintain the security of the detention facility. The effects seized are generally inventoried, noticed by receipt, and stored for return to the person at the time of his release. The loss, theft, or destruction of property so seized has not, to my knowledge, ever been thought to state a Fourth Amendment claim. Rather, improper inventories, defective receipts, and missing property have long been redressable in tort by actions for detinue, trespass to chattel, and conversion. Cf. *Kosak* v. *United States*, 465 U. S. 848 (1984) (discussing liability of Federal Government for losses incurred during customs officials' searches and seizures). Whether those remedies are adequate and made available as promised have always been questions for the Takings and Due Process Clauses. The Fourth Amendment has never had a role to play.

In sum, while I share JUSTICE STEVENS' concerns about the rights of prison inmates, I do not believe he has correctly identified the constitutional sources that provide their property with protection. Those sources are the Due Process and the Takings Clauses of the Fifth and Fourteenth Amendments, not the Search and Seizure Clause of the Fourth Amendment. In these cases, the Commonwealth of Virginia has demonstrated that it provides aggrieved inmates with a grievance procedure and various state tort and common-law remedies. The plaintiff inmate has not availed himself of these remedies or successfully proved that they are inadequate. Thus, his complaint cannot be said to have stated a ripe constitutional claim and summary judgment for the defendant was proper.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

This case comes to us on the pleadings. We must take the allegations in Palmer's complaint as true.[1] Liberally construing this *pro se* complaint as we must,[2] it alleges that after examining it, prison guard Hudson maliciously took and destroyed a quantity of Palmer's property, including legal materials and letters, for no reason other than harassment.[3]

For the reasons stated in Part II–B of the opinion of the Court, I agree that Palmer's complaint does not allege a violation of his constitutional right to procedural due process.[4] The reasoning in Part II–A of the Court's opinion, however, is seriously flawed—indeed, internally inconsistent. The Court correctly concludes that the imperatives of prison administration require random searches of prison cells, and also correctly states that in the prison context "[o]f course, there is a risk of maliciously motivated searches, and of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society." *Ante,* at 528. But the Court then holds that no matter how malicious, destructive, or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable. *Ante,* at 525–526.

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[1] See *Hughes* v. *Rowe*, 449 U. S. 5, 10 (1980) *(per curiam); California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 515–516 (1972); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174–175 (1965); *Cooper* v. *Pate*, 378 U. S. 546 (1964) *(per curiam).*

[2] See *Boag* v. *MacDougall*, 454 U. S. 364 (1982) *(per curiam); Haines* v. *Kerner*, 404 U. S. 519 (1972) *(per curiam).*

[3] "On 9-16-81 around 5:50 p. m., officer Hudson shook down my locker and destroyed a lot of my property, *i. e.:* legal materials, letters, and other personal property only as a means of harassment. Officer Hudson has violated my Constitutional rights. The shakedown was no routine shakedown. It was planned and carried out only as harassment. Hudson stated the next time he would really mess my stuff up. I have plenty of witnesses to these facts." App. 7–8.

[4] I join Part II–B of the opinion of the Court on the understanding that it simply applies the holding of *Parratt* v. *Taylor*, 451 U. S. 527 (1981), to the facts of this case. I do not understand the Court's holding to apply to conduct that violates a substantive constitutional right—actions governmental officials may not take no matter what procedural protections accompany them, see *Parratt*, 451 U. S., at 545 (BLACKMUN, J., concurring); see also *id.*, at 552–553 (POWELL, J., concurring in result); or to cases in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property, see *id.*, at 543; see also *Block* v. *Rutherford*, *post*, at 591–592, n. 12; *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 435–436 (1982).

Measured by the conditions that prevail in a free society, neither the possessions nor the slight residuum of privacy that a prison inmate can retain in his cell, can have more than the most minimal value. From the standpoint of the prisoner, however, that trivial residuum may mark the difference between slavery and humanity. On another occasion, THE CHIEF JUSTICE wrote:

> "It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights. Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Houchins* v. *KQED, Inc.,* 438 U. S. 1, 5, n. 2 (1978) (plurality opinion) (citation omitted).

Personal letters, snapshots of family members, a souvenir, a deck of cards, a hobby kit, perhaps a diary or a training manual for an apprentice in a new trade, or even a Bible—a variety of inexpensive items may enable a prisoner to maintain contact with some part of his past and an eye to the possibility of a better future. Are all of these items subject to unrestrained perusal, confiscation, or mutilation at the hands of a possibly hostile guard? Is the Court correct in its perception that "society" is not prepared to recognize *any* privacy or possessory interest of the prison inmate—no matter how remote the threat to prison security may be?

## I

Even if it is assumed that Palmer had no reasonable expectation of privacy in most of the property at issue in this case because it could be inspected at any time, that does not mean he was without Fourth Amendment protection.[5] For the Fourth Amendment protects Palmer's possessory interests in this property entirely apart from whatever privacy interest he may have in it.

> "The first Clause of the Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .' This text protects two kinds of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984) (footnotes omitted).[6]

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[5] Though I am willing to assume that for purposes of this case that the Court's holding concerning most of Palmer's privacy interests is correct, that should not be taken as an endorsement of the Court's new "bright line" rule that a prisoner can have no expectation of privacy in his papers or effects, *ante*, at 523. I cannot see any justification for applying this rule to minimum security facilities in which inmates who pose no realistic threat to security are housed. I also see no justification for reading the mail of a prisoner once it has cleared whatever censorship mechanism is employed by the prison and has been received by the prisoner.

[6] See also *United States* v. *Karo*, *post*, at 712; *United States* v. *Place*, 462 U. S. 696, 707 (1983); *id.*, at 716 (BRENNAN, J., concurring in result); *Texas* v. *Brown*, 460 U. S. 730, 747–748 (1983) (STEVENS, J., concurring in judgment).

There can be no doubt that the complaint adequately alleges a "seizure" within the meaning of the Fourth Amendment. Palmer was completely deprived of his possessory interests in his property; by taking and destroying it, Hudson was asserting "dominion and control" over it; hence his conduct "did constitute a seizure," *id.*, at 120.[7] The fact that the property was destroyed hardly alters the analysis—the possessory interests the Fourth Amendment protects are those of the citizen. From the citizen's standpoint, it makes no difference what the government does with his property once it takes it from him; he is just as much deprived of his possessory interests when it is destroyed as when it is merely taken.[8] This very Term, in *Jacobsen*, we squarely held that destruction of property in a field test for cocaine constituted a constitutionally cognizable interference with possessory interests: "[T]he field test did affect respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one." *Id.*, at 124–125.

The Court suggests that "the interest of society in the security of its penal institutions" precludes prisoners from having any legitimate possessory interests. *Ante,* at 527–528, and n. 8.[9] See also *ante,* at 538 (O'CONNOR, J., concurring). That contention is fundamentally wrong for at least two reasons.

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[7] See also *Bell* v. *Wolfish*, 441 U. S. 520, 574–575 (1979) (MARSHALL, J., dissenting).

[8] JUSTICE O'CONNOR, like the other Members of the majority, would apparently draw a distinction between the physical destruction of the prisoner's property and its "indefinite retention," see *ante*, at 538 (concurring opinion), in that the former may be actionable under the Due Process and Taking Clauses. I am not entirely sure whether she believes that an inmate can be harassed consistently with the Fourth Amendment by temporarily taking custody of his correspondence and family snapshots, for example, because "incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects," *ibid.*, or because "all searches and seizures of the contents of an inmate's cell are reasonable," *ibid.* The net result of her position, however, is that harassment by means of temporarily—*i. e.*, for no longer than the duration of the prisoner's incarceration—depriving an inmate of his personal effects raises no Fourth Amendment issue, and no constitutional issue of any kind if the property is ultimately returned.

First, Palmer's possession of the material was entirely legitimate as a matter of state law. There is no contention that the material seized was contraband or that Palmer's possession of it was in any way inconsistent with applicable prison regulations. Hence, he had a legal right to possess it. In fact, the Court's analysis of Palmer's possessory interests is at odds with its treatment of his due process claim. In Part II–B of its opinion, the Court holds that the material which Hudson took and destroyed was "property" within the meaning of the Due Process Clause. *Ante,* at 533–534. See also *ante,* at 539–540 (O'CONNOR, J., concurring). Indeed, this holding is compelled by *Parratt* v. *Taylor,* 451 U. S. 527 (1981), in which we held that a $23.50 hobby kit which had been mail-ordered but not received by a prisoner was "property" within the meaning of the Due Process Clause. See *id.,* at 536.[10] However, an interest cannot qualify as "property" within the meaning of the Due Process Clause unless it amounts to a legitimate claim of entitlement.[11] Thus in Part

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[9] The existence of state remedies for this seizure, to which the Court adverts, *ante,* at 528, n. 8, as does JUSTICE O'CONNOR, *ante,* at 540, is of course irrelevant to the Fourth Amendment question, since 42 U. S. C. § 1983 provides a remedy for Fourth Amendment violations supplemental to any state remedy that may exist. *Monroe* v. *Pape;* 365 U. S. 167, 183 (1961). See *Burnett* v. *Grattan, ante,* at 50; *Patsy* v. *Florida Board of Regents,* 457 U. S. 496 (1982); *Fair Assessment in Real Estate Assn., Inc.* v. *McNary,* 454 U. S. 100, 104 (1981); *Allen* v. *McCurry,* 449 U. S. 90, 99 (1980); *Paul* v. *Davis,* 424 U. S. 693, 710, n. 5 (1976); *Wilwording* v. *Swenson,* 404 U. S. 249, 251 (1971) *(per curiam); McNeese* v. *Board of Education,* 373 U. S. 668, 671–674 (1963). See also n. 4, *supra.*

[10] On this point, the Court was unanimous, see 451 U. S., at 546–548 (POWELL, J., concurring in result), as it is today.

[11] See, *e. g., Ruckelshaus* v. *Monsanto Co.,* 467 U. S. 986, 1003–1004 (1984); *Logan* v. *Zimmerman Brush Co.,* 455 U. S., at 430–431; *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U. S. 155, 161 (1980); *Greenholtz* v. *Nebraska Penal Inmates,* 442 U. S. 1, 7 (1979); *Leis* v. *Flynt,*

II–B of its opinion the Court necessarily indicates that Palmer had a legitimate claim of entitlement to the material at issue. It is well settled that once a State creates such a constitutionally protected interest, the Constitution forbids it to deprive even a prisoner of such an interest arbitrarily.[12] Thus, Palmer had a legitimate right under both state law and the Due Process Clause to possess the material at issue. That being the case, the Court's own analysis indicates that Palmer had a legitimate possessory interest in the material within the Fourth Amendment's proscription on unreasonable seizures.

Second, the most significant of Palmer's possessory interests are protected as a matter of substantive constitutional law, entirely apart from the legitimacy of those interests under state law or the Due Process Clause. The Eighth Amendment forbids "cruel and unusual punishments." Its proscriptions are measured by society's "evolving standards of decency," *Rhodes* v. *Chapman*, 452 U. S. 337, 346–347 (1981); *Estelle* v. *Gamble*, 429 U. S. 97, 102–103 (1976). The Court's implication that prisoners have no possessory interests that by virtue of the Fourth Amendment are free from state interference cannot, in my view, be squared with the Eighth Amendment. To hold that a prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary or malicious perusal, seizure, or destruction would not, in my judgment, comport with any civilized standard of decency.

There are other substantive constitutional rights that also shed light on the legitimacy of Palmer's possessory interests.

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439 U. S. 438, 441–443 (1979) *(per curiam)*; *Bishop* v. *Wood*, 426 U. S. 341, 344, and nn. 6, 7 (1976); *Arnett* v. *Kennedy*, 416 U. S. 134, 165–166 (1974) (POWELL, J., concurring in part and concurring in result in part); *id.*, at 185 (WHITE, J., concurring in part and dissenting in part); *id.*, at 207–208 (MARSHALL, J., dissenting); *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972).

[12] See *Hewitt* v. *Helms*, 459 U. S. 460, 469–472 (1983); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S., at 11–12; *Wolff* v. *McDonnell*, 418 U. S. 539, 556–558 (1974).

The complaint alleges that the material at issue includes letters and legal materials. This Court has held that the First Amendment entitles a prisoner to receive and send mail, subject only to the institution's right to censor letters or withhold delivery if necessary to protect institutional security, and if accompanied by appropriate procedural safeguards.[13] We have also held that the Fourteenth Amendment entitles a prisoner to reasonable access to legal materials as a corollary of the constitutional right of access to the courts.[14] Thus, these substantive constitutional rights affirmatively protect Palmer's right to possess the material in question free from state interference. It is therefore beyond me how the Court can question the legitimacy of Palmer's possessory interests which were so clearly infringed by Hudson's alleged conduct.

## II

Once it is concluded that Palmer has adequately alleged a "seizure," the question becomes whether the seizure was "unreasonable." Questions of Fourth Amendment reasonableness can be resolved only by balancing the intrusion on constitutionally protected interests against the law enforcement interests justifying the challenged conduct.[15]

It is well settled that the discretion accorded prison officials is not absolute.[16] A prisoner retains those constitutional rights not inconsistent with legitimate penological objectives.[17] There can be no penological justification for the seizure alleged here. There is no contention that Palmer's property posed any threat to institutional security. Hudson had already examined the material before he took and destroyed it. The allegation is that Hudson did this for no reason save spite; there is no contention that under prison regulations the material was contraband, and in any event as I have indicated above the Constitution prohibits a State from treating letters and legal materials as contraband. The Court agrees that intentional harassment of prisoners by

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[13] See *Procunier* v. *Martinez*, 416 U. S. 396 (1974). A prisoner's possession of other types of personal property relating to religious observance, such as a Bible or a crucifix, is surely protected by the Free Exercise Clause of the First Amendment. See *Cruz* v. *Beto*, 405 U. S. 319, 322, n. 2 (1972) *(per curiam)*.

[14] See *Bounds* v. *Smith*, 430 U. S. 817 (1977).

[15] See, *e. g.*, *United States* v. *Jacobsen*, 466 U. S. 109, 125 (1984); *Michigan* v. *Long*, 463 U. S. 1032, 1051 (1983); *United States* v. *Place*, 462 U. S., at 703; *Bell* v. *Wolfish*, 441 U. S., at 559.

[16] See *Bell* v. *Wolfish*, 441 U. S., at 562; *Procunier* v. *Martinez*, 416 U. S., at 405–406; *Cruz* v. *Beto*, 405 U. S., at 321–322 *(per curiam)*; *Haines* v. *Kerner*, 404 U. S., at 520–521 *(per curiam)*. See also *Rhodes* v. *Chapman*, 452 U. S. 337, 352 (1981); *id.*, at 368–369 (BLACKMUN, J., concurring in judgment); *Estelle* v. *Gamble*, 429 U. S. 97, 102–105 (1976);

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*Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 866–870 (1974) (POWELL, J., dissenting).

[17] See *Bell* v. *Wolfish*, 441 U. S., at 545–547; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 125, 129 (1977); *Wolff* v. *McDonnell*, 418 U. S., at 555–556; *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974); *Procunier* v. *Martinez*, 416 U. S., at 412–414. No precedent of this Court indicates that this general principle is inapplicable to the Fourth Amendment. As the Court acknowledges, statements concerning the application of the Fourth Amendment to prisons in *Lanza* v. *New York*, 370 U. S. 139, 143–144 (1962), were dicta and were not joined by a majority of the Court. See *ante*, at 524–525, n. 6. I therefore do not understand why JUSTICE O'CONNOR seems to treat that case as an authoritative precedent, *ante*, at 538 (concurring opinion). In *Bell* v. *Wolfish*, the Court explicitly reserved questions concerning prisoners' expectations of privacy and the seizure and destruction of prisoners' property. See 441 U. S., at 556–557, and n. 38. In *United States* v. *Edwards*, 415 U. S. 800 (1974), we approved "no more than taking from [an arrestee] the effects in his immediate possession that constituted evidence of crime," *id.*, at 805, and reserved decision on the question presented here, see *id.*, at 808, n. 9. Conversely, when this Court last confronted the question decided today, it took it as given that the seizure of a prisoner's letters was subject to the Fourth Amendment:

> "[T]he letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights." *Stroud* v. *United States*, 251 U. S. 15, 21–22 (1919).

guards is intolerable, *ante*, at 528. That being the case, there is no room for any conclusion but that the alleged seizure was unreasonable. The need for "close and continual surveillance of inmates and their cells," *ante*, at 527, in no way justifies taking and destroying noncontraband property; if material is examined and found not to be contraband, there can be no justification for its seizure. When, as here, the material at issue is not contraband it simply makes no sense to say that its seizure and destruction serve "legitimate institutional interests." *Ante*, at 528, n. 8. Such seizures are unreasonable.[18]

The Court's holding is based on its belief that society would not recognize as reasonable the possessory interests of prisoners. Its perception of what society is prepared to recognize as reasonable is not based on any empirical data; rather it merely reflects the perception of the four Justices who have joined the opinion that THE CHIEF JUSTICE has authored. On the question of what seizures society is prepared to consider reasonable, surely the consensus on that issue in the lower courts is of some significance. Virtually every federal judge to address the question over the past decade has concluded that the Fourth Amendment does apply to a prison cell.[19] There is similar unanimity among the commentators.[20] The Court itself acknowledges that "intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society." *Ante*, at 528. That being the case, I fail to see how a seizure that serves no purpose except harassment does not invade an interest that society considers reasonable, and that is protected by the Fourth Amendment.

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[18] It follows that I disagree with the premise on which JUSTICE O'CONNOR decides this case: "[I]f the act of taking possession and the indefinite retention of the property are themselves reasonable, the handling of the property while in the government's custody is not itself of Fourth Amendment concern." *Ante*, at 538–539 (concurring opinion). Hudson's infringement of Palmer's possessory interests was not reasonable. If we accept the allegations in the complaint as true—as we must—neither the act of taking possession nor the indefinite retention of these harmless noncontraband items would have been reasonable or justified by any legitimate institutional interest. Hudson took the property solely to harass Palmer.

[19] The Circuits which have addressed this question are unanimous. See, *e. g.*, *Lyon* v. *Farrier*, 727 F. 2d 766, 769 (CA8 1984), cert. pending, No. 83–6722; *United States* v. *Mills*, 704 F. 2d 1553, 1560–1561 (CA11 1983), cert. denied, 467 U. S. 1243 (1984); *United States* v. *Chamorro*, 687 F. 2d 1, 4–5 (CA1), cert. denied, 459 U. S. 1043 (1982); *United States*

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v. *Hinckley*, 217 U. S. App. D. C. 262, 275–279, 672 F. 2d 115, 128–132 (1982); *United States* v. *Lilly*, 576 F. 2d 1240, 1245–1246 (CA5 1978); *United States* v. *Ready*, 574 F. 2d 1009, 1013–1014 (CA10 1978); *United States* v. *Stumes*, 549 F. 2d 831 (CA8 1977) *(per curiam); Bonner* v. *Coughlin*, 517 F. 2d 1311, 1315–1317 (CA7 1975), modified on other grounds, 545 F. 2d 565 (1976) (en banc), cert. denied, 435 U. S. 932 (1978); *Daugherty* v. *Harris*, 476 F. 2d 292 (CA10), cert. denied, 414 U. S. 872 (1973). The Court claims that the Second and Ninth Circuits have reached a conclusion in accord with its own, see *ante*, at 522, n. 5, but both of the decisions it cites predated *Wolff* v. *McDonnell*. Prior to *Wolff* many courts thought that no judicial review of prison conditions was possible. See generally Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985 (1962); Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L. J. 506 (1963). It is now the law in both Circuits that the Fourth Amendment protects prisoners against searches and seizures not reasonably related to institutional needs. See *Hodges* v. *Stanley*, 712 F. 2d 34, 35 (CA2 1983) *(per curiam); DiGuiseppe* v. *Ward*, 698 F. 2d 602, 605 (CA2 1983); *United States* v. *Vallez*, 653 F. 2d 403, 406 (CA9), cert. denied, 454 U. S. 904 (1981); *Sostre* v. *Preiser*, 519 F. 2d 763 (CA2 1975); *United States* v. *Dawson*, 516 F. 2d 796, 805–806 (CA9), cert. denied, 423 U. S. 855 (1975); *Hansen* v. *May*, 502 F. 2d 728, 730 (CA9 1974); *United States* v. *Savage*, 482 F. 2d 1371, 1372–1373 (CA9 1973), cert. denied, 415 U. S. 932 (1974).

[20] See ABA Standards for Criminal Justice 23–6.10 Commentary (2d ed. 1980); Gianelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045 (1976); Singer, Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons, 21 Buffalo L. Rev. 669 (1972); Note, Constitutional Limitations on Body Searches in Prisons, 82 Colum. L. Rev. 1033, 1043–1055 (1982); Comment, Electronic Surveillance in California Prisons after Delancie v. Superior Court: Civil Liberty or Civil Death?, 22 Santa Clara L. Rev. 1109 (1982).

The Court rests its view of "reasonableness" almost entirely upon its assessment of the security needs of prisons. *Ante*, at 527–528. Because deference to institutional needs is so critical to the Court's approach, it is worth inquiring as to the view prison administrators take toward conduct of the type at issue here. On that score the Court demonstrates a remarkable lack of awareness as to what penologists and correctional officials consider "legitimate institutional interests." I am unaware that any responsible prison administrator has ever contended that there is a need to take or destroy noncontraband property of prisoners; the Court certainly provides no evidence to support its conclusion that institutions require this sort of power. To the contrary, it appears to be the near-universal view of correctional officials that guards should neither seize nor destroy noncontraband property. For example, the Federal Bureau of Prisons' regulations state that only items which may not be possessed by a prisoner can be seized by prison officials, see 28 CFR §§ 553.12, 553.13 (1983). They also provide that prisoners can retain property consistent with prison management, specifically including clothing, legal materials, hobbycraft materials, commissary items, radios and watches, correspondence, reading materials, and personal photos.[21] Virginia law and its Department of Corrections' regulations similarly authorize seizure of contraband items alone.[22] I am aware of no prison system with a different practice;[23] the standards for prison administration which have been promulgated for correctional institutions invariably require prison officials to respect prisoners' possessory rights in noncontraband personal property.[24]

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[21] See 28 CFR §§ 553.10, 553.11 (1983). The regulations also state: "Staff conducting the search shall leave the housing or work area as nearly as practicable in its original order." § 552.13(b). See also U. S. Dept. of Justice, Federal Standards for Prisons and Jails § 13.01 (1980) ("Written policy and procedure specify the personal property inmates can retain in their possession. . . . It should be made clear to inmates what personal property they may retain, and inmates should be assured both that the facility's policies are applied uniformly and that their property will be stored safely").

[22] See Va. Code § 53.1–26 (1982) ("Any item of personal property which a prisoner in any state correctional facility is prohibited from possessing by the Code of Virginia or by the rules of the Director shall, when found in the possession of a prisoner, be confiscated and sold or destroyed"); Virginia

Depriving inmates of any residuum of privacy or possessory rights is in fact plainly *contrary* to institutional goals. Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others and therefore are more prone to violence toward themselves or others.[25] At the same time, such an approach undermines the rehabilitative function of the institution: "Without the privacy and dignity provided by fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished. It is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures." Gianelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045, 1069 (1976).

To justify its conclusion, the Court recites statistics concerning the number of crimes that occur within prisons. For example, it notes that over an 18-month period approxi-

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Department of Corrections, Division of Adult Services, Guideline No. 411 (Sept. 16, 1983).

[23] For example, the Illinois regulation considered in *Bonner* v. *Coughlin*, 517 F. 2d, at 1314, n. 6, provided: "It is important and essential that searches be systematic and do not result in damage, loss, or abuse to any inmate's personal property. Deliberately damaging, confiscating, or abusing any inmate's permitted personal property will result in disciplinary action against the offending employee."

[24] See ABA Standards for Criminal Justice 23–6.10 (2d ed. 1980); American Correctional Association, Standards for Adult Correctional Institutions 2–4192 (2d ed. 1981); National Advisory Commission on Criminal Standards and Goals, Corrections 2.7 (1973).

[25] A summary of the literature is found in Schwartz, Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison, 63 J. Crim. L., C. & P. S. 229 (1972).

mately 120 prisoners were murdered in state and federal facilities. *Ante,* at 526. At the end of 1983 there were 438,830 inmates in state and federal prisons.[26] The Court's homicide rate of 80 per year yields an annual prison homicide rate of 18.26 persons per 100,000 inmates. In 1982, the homicide rate in Miami was 51.98 per 100,000; in New York it was 23.50 per 100,000; in Dallas 31.53 per 100,000; and in the District of Columbia 30.70 per 100,000.[27] Thus, the prison homicide rate, it turns out, is significantly lower than that in many of our major cities. I do not suggest this type of analysis provides a standard for measuring the reasonableness of a search or seizure within prisons, but I do suggest that the Court's use of statistics is less than persuasive.[28]

The size of the inmate population also belies the Court's hypothesis that all prisoners fit into a violent, incorrigible stereotype. Many, of course, become recidivists. But literally thousands upon thousands of former prisoners are now leading constructive law-abiding lives.[29] The nihilistic tone of the Court's opinion—seemingly assuming that all prisoners have demonstrated an inability "to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint," *ante*, at 526, is consistent with its conception of prisons as sterile warehouses, but not with an enlightened view of the function of a modern prison system.[30]

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[26] U. S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 1983 (Apr. 1984).

[27] See U. S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States—1982, pp. 51, 65, 70, 92 (1983).

[28] The size of the prison population also sheds light on what society may consider reasonable with respect to the property and privacy of prisoners. When one recognizes that the prison population is constantly changing and that most inmates have family or friends who retain an interest in their well-being, one must acknowledge that millions of citizens may well believe that prisoners should retain some residuum of privacy and possessory rights.

[29] The Court's portrayal of the stereotypical prison inmate entirely overlooks the wide range of individuals who actually have served and do serve time in the prison system. It ignores, for example, the conscientious objectors who refuse to register for the draft, and the corporate executives who have been convicted of violating securities, antitrust, or tax laws, union leaders, former White House aides, former Governors, judges, and legislators, famous writers and sports heroes, and many thousands who have committed serious offenses but for whom crime is by no means a way of life.

In the final analysis, however, any deference to institutional needs is totally undermined by the fact that Palmer's property was not contraband. If Palmer were allowed to possess the property, then there can be no contention that any institutional need or policy justified the seizure and destruction of the property. Once it is agreed that random searches of a prisoner's cell are reasonable to ensure that the cell contains no contraband, there can be no need for seizure and destruction of noncontraband items found during such searches. To accord prisoners any less protection is to declare that the prisoners are entitled to no measure of human dignity or individuality—not a photo, a letter, nor anything except standard-issue prison clothing would be free from arbitrary seizure and destruction. Yet that is the view the

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[30] I cannot help but think that the Court's holding is influenced by an unstated fear that if it recognizes that prisoners have any Fourth Amendment protection this will lead to a flood of frivolous lawsuits. Of course, this type of burden is not sufficient to justify a judicial modification of the requirements of law. See *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984); *Patsy* v. *Florida Board of Regents*, 457 U. S., at 512, n. 13. "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [defendants] from vexatious litigation, then there is something wrong with those procedures, not with the [Fourth Amendment]." *Hoover* v. *Ronwin*, 466 U. S. 558, 601 (1984) (STEVENS, J., dissenting) (footnote omitted). In fact, the lower courts have permitted such suits to be brought for some time now, see n. 19, *supra*, without disastrous results. Moreover, costs can be awarded against the plaintiff when frivolous cases are brought, see 466 U. S., at 601, n. 27. Even modest assessments against prisoners' accounts could provide an effective weapon for deterring truly groundless litigation.

Court takes today. It declares prisoners to be little more than chattels, a view I thought society had outgrown long ago.

## III

By adopting its "bright line" rule, the Court takes the "hands off" approach to prison administration that I thought it had abandoned forever when it wrote in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974):

> "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.*, at 555–556.

The first Clause of the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." Today's holding means that the Fourth Amendment has no application at all to a prisoner's "papers and effects." This rather astonishing repeal of the Constitution is unprecedented;[31] since *Wolff* we have consistently followed its command that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.*, at 556.[32]

Today's holding cannot be squared with the text of the Constitution, nor with common sense. The Fourth Amendment is of "general application," and its text requires that every search or seizure of "papers and effects" be evaluated for its reasonableness. The Court's refusal to inquire into the reasonableness of official conduct whenever a prisoner is involved—its conclusive presumption that all searches and seizures of prisoners' property are reasonable—can be squared neither with the constitutional text, nor with the reality, acknowledged by the Court, that our prison system is less than ideal; unfortunately abusive conduct sometimes does occur in our prisons.

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[31] The Court's repeal does appear to extend to less than the entire Amendment. It appears to limit its holding to a prisoner's "papers and effects" located in his cell. Apparently it believes that at least a prisoner's "person" is secure from unreasonable search and seizure. See *Bell* v. *Wolfish*, 441 U. S., at 563 (POWELL, J., concurring in part and dissenting in part).

[32] See cases cited, nn. 16, 17, *supra*.

More fundamentally, in its eagerness to adopt a rule consistent with what it believes to be wise penal administration, the Court overlooks the purpose of a written Constitution and its Bill of Rights. That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities.[33] The Fourth Amendment is part of that fundamental law; it represents a value judgment that unjustified search and seizure so greatly threatens individual liberty that it must be forever condemned as a matter of constitutional principle.[34]

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[33] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 638 (1943).

[34] "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the signficance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the indi-

The courts, of course, have a special obligation to protect the rights of prisoners.[35] Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a "discrete and insular minority."[36] In this case, the destruction of Palmer's property was a seizure; the Judiciary has a constitutional duty to determine whether it was justified. The Court's conclusive presumption that all conduct by prison guards is reasonable is supported by nothing more than its idiosyncratic view of the imperatives of prison administration—a view not shared by prison administrators themselves. Such a justification is nothing less than a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency.

More than a decade ago I wrote:

> "[T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.

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vidual, by whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

[35] See *Rhodes* v. *Chapman*, 452 U. S. 337, 358–361 (1981) (BRENNAN, J., concurring in judgment); *id.*, at 369 (BLACKMUN, J., concurring in judgment); *United States* v. *Bailey*, 444 U. S. 394, 423–424 (1980) (BLACKMUN, J., dissenting).

[36] See *Bernal* v. *Fainter*, 467 U. S. 216, 222, n. 7 (1984); *Toll* v. *Moreno*, 458 U. S. 1, 23 (1982) (BLACKMUN, J., concurring); *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 800, n. 8 (1980) (BLACKMUN, J., concurring in judgment); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 313 (1976) *(per curiam)*; *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 102, and n. 22 (1976); *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971); *Oregon* v. *Mitchell*, 400 U. S. 112, 295, n. 14 (1970) (Stewart, J., concurring in part and dissenting in part); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938).

> 'Liberty' and 'custody' are not mutually exclusive concepts." *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 712 (CA7 1973) (footnotes omitted), cert. denied *sub nom. Gutierrez* v. *Department of Public Safety of Illinois*, 414 U. S. 1146 (1974).

By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence.

Accordingly, I respectfully dissent from the Court's judgment in No. 82–1630 and from Part II–A of its opinion.

# WASMAN *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-173. Argued March 20, 1984—Decided July 3, 1984

Prior to trial on a federal indictment charging petitioner with mail fraud, he was indicted, tried, and convicted of the unrelated federal offense of knowingly and willfully making false statements in a passport application. At the sentencing hearing, the trial judge stated that, pursuant to his usual practice, he would not consider the pending mail fraud charge in passing sentence but would consider only prior convictions. Petitioner was then sentenced to two years' imprisonment, all but six months of which was suspended in favor of three years of probation. Thereafter, the mail fraud indictment was dismissed, and an information charging petitioner with possession of counterfeit certificates of deposit was substituted. Petitioner pleaded *nolo contendere* to that charge before a different District Court Judge and was sentenced to two years' probation. Subsequently, the Court of Appeals reversed petitioner's conviction for the passport offense, and petitioner was retried on the charge before the same trial judge and was again convicted. In imposing a sentence of two years' imprisonment, none of which was suspended, the trial judge explained that he imposed the greater sentence because of petitioner's intervening conviction for possession of counterfeit certificates of deposit. The judge rejected petitioner's argument that because the *conduct* underlying the conviction for possession of counterfeit certificates of deposit occurred prior to petitioner's original sentencing on the passport conviction, he could not, under *North Carolina* v. *Pearce*, 395 U. S. 711, receive a sentence greater than that received for the original conviction. The Court of Appeals affirmed.

*Held:* After retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant *conduct* or *events* that occurred subsequent to the original sentencing proceedings. Pp. 563-565, 569-571, 571-572.

(a) In *Pearce, supra*, the Court held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences motivated by vindictive retaliation by the judge after reconviction following a successful appeal, and that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Thus, *Pearce* establishes a rebuttable presumption of vindictiveness, not an absolute prohibition against enhancement of sentence. Pp. 563–565.

(b) Here, the fact that petitioner in effect received a greater sentence of confinement following retrial than he had originally received was sufficient to engage the presumption of *Pearce*. However, the trial judge carefully explained his reasons for imposing the greater sentence, and his consideration of the intervening conviction was manifestly legitimate, amply rebutting any presumption of vindictiveness. Pp. 569–571.

700 F. 2d 663, affirmed.

BURGER, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III–A, III–C, and IV, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II–B and III–B, in which WHITE, REHNQUIST, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 573. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 574. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 574.

*Jay R. Moskowitz* argued the cause and filed briefs for petitioner.

*Alan I. Horowitz* argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Robert J. Erickson*.

CHIEF JUSTICE BURGER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III–A, III–C, and IV, and an opinion with respect to Parts II–B and III–B, in which JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR joined.

We granted certiorari to decide whether the Due Process Clause of the Fifth Amendment was violated when a federal defendant was given a greater sentence after retrial following a successful appeal than he had been given after his original conviction because the sentencing court considered an intervening criminal conviction for acts committed prior to the original sentencing.

## I

Petitioner, an attorney, was indicted on four counts of mail fraud in violation of 18 U. S. C. § 1341. Prior to trial on these charges, he was indicted, tried, and convicted of the unrelated offense of knowingly and willfully making false statements in a passport application, in violation of 18 U. S. C. § 1542. At the sentencing hearing following petitioner's first conviction, the Government advised the court that charges were then pending against petitioner for mail fraud and that petitioner previously had been convicted for failure to file a tax return. Petitioner's counsel replied that it would be inappropriate for the court to consider the pending mail fraud charges in its sentencing on the passport conviction because petitioner had yet to respond to the charges.

The District Court Judge informed the parties that he would not consider the pending mail fraud charge in sentencing petitioner. The judge explained that he always considered prior convictions when sentencing a defendant but that he did not consider pending charges: "[I]f judges at the time of considering prior convictions also consider pending cases . . . then if that pending case resulted in a conviction, one of the sentences would inevitably have been a pyramided sentence." App. 26. Following this colloquy, the judge sentenced petitioner on the passport offense to two years of imprisonment, all but six months of which he suspended in favor of three years of probation.

Thereafter, pursuant to negotiations between petitioner and the Government, the Government dismissed the mail fraud indictment and substituted a one-count information charging petitioner with possession of counterfeit certificates of deposit, in violation of 18 U. S. C. § 480. Petitioner pleaded *nolo contendere* to this charge before another Federal District Court Judge in the Southern District of Florida and was sentenced to two years' probation. App. to Brief for Petitioner 3–15.

The Court of Appeals for what was then the Fifth Circuit subsequently reversed petitioner's first conviction on grounds not material here and remanded for a new trial. 641 F. 2d 326 (1981). Petitioner was retried on that charge and was again convicted. The presiding judge at the second trial was the same judge who had presided at petitioner's first trial on the passport offense and sentenced petitioner to the 2-year partially suspended sentence, with probation. This time, the judge sentenced petitioner to two years of imprisonment, none of which was suspended. The judge explained to petitioner and counsel for the Government that he was imposing a greater sentence because of petitioner's intervening conviction for possession of counterfeit certificates of deposit:

> "[W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time, he comes before me with two convictions. Last time, he came before me with one conviction." App. to Pet. for Cert. A–42.

The judge rejected an argument by petitioner's counsel that because the conduct underlying the conviction for possession of counterfeit certificates of deposit occurred prior to petitioner's original sentencing on the passport conviction, petitioner could not, under *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), receive a sentence greater than that received for the original conviction.

The Court of Appeals for the Eleventh Circuit affirmed, holding that petitioner's increased sentence "was based on objective, factual new evidence not previously considered, that it was neither motivated by judicial vindictiveness nor reasonably perceivable as having been so motivated . . . ." 700 F. 2d 663, 670 (1983). It held that the District Court

> "followed precisely the procedural steps of [*North Carolina* v. ] *Pearce*, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy [could] be fully reviewed on appeal." *Id.*, at 667.

The Court of Appeals rejected petitioner's argument that his sentence could not be increased after retrial based on the intervening counterfeiting conviction because the counterfeiting offense itself was not "conduct on the part of the defendant occurring after the time of the original sentencing," see *Pearce*, *supra*, at 726. The Court of Appeals read *Pearce* to be concerned only with "vindictive sentencing, not defendant misbehavior between trials." The Court of Appeals noted that there was "no evidence whatsoever" that petitioner's sentence was increased out of vindictiveness. The court expressly declined to follow the contrary holdings of the Courts of Appeals for the Second and Ninth Circuits that an enhanced sentence must be based upon *conduct* of the defendant occurring after the original sentencing. See *United States* v. *Markus*, 603 F. 2d 409 (CA2 1979); *United States* v. *Williams*, 651 F. 2d 644 (CA9 1981).

We granted certiorari, 464 U. S. 932 (1983), to resolve the conflict among the Circuits as to the meaning of this Court's holding in *Pearce*.

## II

### A

It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Justice Black made this point when, writing for the Court in *Williams* v. *New York*, 337 U. S. 241, 247 (1949), he observed that

> "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant. *Ibid.*

In *Pearce, supra,* however, the Court recognized at least one limitation on the discretion of the sentencing authority where a sentence is increased after reconviction following a successful appeal. Two separate cases were before the Court in *Pearce.* In both cases, the defendants successfully appealed their original convictions and on retrial received greater sentences than they had received originally. The Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause barred imposition of the greater sentences after the reconvictions of the defendants. However, it held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences actually motivated by vindictive retaliation by the judge: "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U. S., at 725. Because fear of such vindictiveness might chill a defendant's decision to appeal or to attack his conviction collaterally, the Court went on to say that "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Ibid.* (footnote omitted).

To prevent actual vindictiveness from entering into a decision and allay any fear on the part of a defendant that an increased sentence is in fact the product of vindictiveness, the Court fashioned what in essence is a "prophylactic rule," see *Colten* v. *Kentucky*, 407 U. S. 104, 116 (1972), that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U. S., at 726. This rule has been read to "[apply] a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States* v. *Goodwin*, 457 U. S. 368, 374 (1982). The rationale for requiring that "the factual data upon which the increased sentence is based" be made part of the record, of course, is that the "constitutional legitimacy," of the enhanced sentence may thereby be readily assessed on appeal. *Ibid.*

In *Pearce*, the State had offered "no evidence" whatever to justify respondent Rice's increased sentence; it had not even "attempted to explain or justify" the greater penalty. 395 U. S., at 726. Similarly, the State had advanced no reason for Pearce's sentence "beyond the naked power to impose it," *ibid.* Finding the record barren of any evidence to rebut the presumption of vindictiveness and support the increased sentences in either of the two cases in *Pearce*, the Court affirmed the judgments granting relief.

## B

In only one other circumstance has the Court identified a need to indulge a presumption of vindictiveness of the kind imposed in *Pearce*. In *Blackledge* v. *Perry*, 417 U. S. 21 (1974), Perry, while in state prison, was involved in a fight with a fellow inmate, and was charged with the misdemeanor offense of assault with a deadly weapon. He was convicted in the State's District Court Division and sentenced to a 6-month prison term to run consecutively to the term he was then serving. He appealed to the County Superior Court, where, under applicable state law, he had a right to a trial *de novo*.

After Perry filed his notice of appeal, but before trial, the prosecutor obtained an indictment against Perry for the felony offense of assault with a deadly weapon with intent to kill and inflict serious bodily injury. Perry pleaded guilty to the felony offense and was sentenced to a term of five to seven years' imprisonment to run consecutively with the sentence he was then serving. The effect of this was to increase Perry's sentence by the 17 months that he had already served under the sentence imposed by the District Court Division.

We held that the indictment for the felony offense was impermissible under the Due Process Clause of the Fourteenth Amendment, stating that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Id.*, at 27. The prosecutor, we noted, "clearly has a considerable stake in discouraging convicted misdemeanants from appealing and . . . obtaining a trial *de novo* . . . ." *Ibid.*

Although there was no affirmative evidence tendered that the prosecutor brought the felony charge in bad faith, we agreed that, because the record was devoid of any explanation for the new indictment, relief should be granted. Consistent with *Pearce*, however, we explicitly observed that a different disposition would have been called for had the State advanced a legitimate nonvindictive justification for the greater charge. 417 U. S., at 29, n. 7. This acknowledgment, of course, was no more than a reaffirmation that *Pearce* established a rebuttable presumption of vindictiveness, not an absolute prohibition on enhancement of sentence.

Because of its "severity," see *Goodwin*, *supra*, at 373, the Court has been chary about extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as in *Pearce* and *Blackledge*. This reluctance is understandable for, as we have noted, operation of the presumption often "block[s] a legitimate response to criminal conduct." 457 U. S., at 373. In the four following cases, we expressly declined invitations to extend the presumption.

We saw no need for application of the presumption in the context of Kentucky's two-tier trial system. *Colten*

v. *Kentucky, supra.* Under Kentucky law, a defendant convicted of a misdemeanor in the inferior court had the right to a trial *de novo* in a court of general jurisdiction. We rejected the contention in *Colten* that the *de novo* tribunal was constitutionally prohibited from imposing a greater sentence than that imposed in the original trial. We held that "[t]he possibility of vindictiveness, found to exist in *Pearce,* [was] not inherent in the Kentucky two-tier system." *Id.,* at 116. While we believed that the prophylactic rule was unnecessary, we left open the possibility that a defendant might prove actual vindictiveness and thereby establish a due process violation; we held only that the Kentucky trial *de novo* system "as such" was not unconstitutional. *Id.,* at 119.

Similarly, in *Chaffin* v. *Stynchcombe,* 412 U. S. 17 (1973), we rejected the need for the prophylactic *Pearce* presumption because we perceived as "*de minimis*" the possibility that an increased sentence by a jury upon reconviction after a new trial would be motivated by vindictiveness. Not only was the second jury in *Chaffin* unaware of the prior conviction, but in contrast to the judge and the prosecutor in *Pearce* and *Blackledge,* it was thought unlikely that a jury would consider itself to have a "personal stake" in a prior conviction or a "motivation to engage in self-vindication." 412 U. S., at 27. We emphasized in *Chaffin* that

> "*Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process." *Id.,* at 25.

*Pearce,* we explained, was only "premised on the apparent need to guard against *vindictiveness* in the resentencing process." 412 U. S., at 25 (emphasis in original). Consequently, as in *Colten,* we noted that jury sentencing used as a means of "punishing or penalizing the assertion of protected rights" might violate due process. 412 U. S., at 32, n. 20.

In *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), we held that due process is not implicated when a prosecutor threatens to seek conviction on a greater offense if the defendant does not plead guilty and in fact does so when the defendant proceeds to trial. We declined to characterize this conduct as "punishment or retaliation" offensive to due process, *id.*, at 363, instead noting that such was a mere byproduct of the "'give-and-take negotiation common in plea bargaining.'" *Id.*, at 362 (quoting *Parker* v. *North Carolina*, 397 U. S. 790, 809 (1970) (BRENNAN, J., dissenting). As in *Colten* and *Chaffin*, we did not rule out, however, the possibility that a defendant could establish a due process violation by proof of actual vindictiveness. See *United States* v. *Goodwin*, 457 U. S., at 380, n. 12.

Most recently, we held in *United States* v. *Goodwin*, *supra*, that the *Pearce* presumption of vindictiveness is unwarranted where a prosecutor adds a felony charge before trial to a defendant's misdemeanor charge after the defendant demands a jury trial on the misdemeanor charge. We thought it highly unlikely "that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest." 457 U. S., at 384. Consistent with our earlier cases, we again explicitly recognized "the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Ibid.* (footnote omitted).

If it was not clear from the Court's holding in *Pearce*, it is clear from our subsequent cases applying *Pearce* that due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by *actual vindictiveness* toward the defendant for having exercised guaranteed rights. In *Pearce* and in *Blackledge*, the Court "presumed" that the increased sentence and charge were the products of actual vindictiveness aroused by the defendants' appeals. It held that the defendants' right to due process was violated not because the sentence and charge were enhanced, but because there was no evidence introduced to rebut the presumption that actual vindictiveness was behind the increases; in other words, by operation of law, the increases were deemed motivated by vindictiveness. In *Colten*, *Chaffin*, *Bordenkircher*, and *Goodwin*, on the other hand—where the presumption was held not to apply—we made clear that a due process violation could be established only by proof of actual vindictiveness.

In sum, where the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness; where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness.

## III

### A

Here, petitioner in effect received a greater sentence of confinement following retrial than he had originally received. This was sufficient to engage the presumption of *Pearce*. In sharp contrast to *Pearce* and *Blackledge*, however, the trial judge here carefully explained his reasons for imposing the greater sentence. The care with which the trial judge approached the resentencing is clear from the record, and it bears repeating:

> "[W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction."

Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate. This amply rebuts any presumption of vindictiveness. Here, the trial judge's justification is plain even from the record of petitioner's first sentencing proceeding; the judge informed the parties that, although he did not consider pending *charges* when sentencing a defendant, he always took into account prior criminal *convictions*. This, of course, was proper; indeed, failure to do so would have been inappropriate.

Petitioner does not charge that the judge was vindictive. Rather, he argues that any consideration of his intervening conviction was foreclosed by the plain language of *Pearce*. Petitioner points to the passage in *Pearce* stating that the reasons posited by a court for increasing a defendant's sentence on retrial "must be based upon objective information concerning identifiable *conduct* on the part of the defendant occurring *after* the time of the original sentencing proceeding." 395 U. S., at 726 (emphasis added). His contention is that the "conduct" for which he was convicted, *i. e.*, possession of counterfeit certificates of deposit, occurred prior to the time of his original sentencing proceeding and thus could not be considered by the trial judge.

*Pearce* is not without its ambiguities; the passage recited by petitioner, for example, is said by petitioner to conflict with the following language in the same section of the opinion:

> "A man who is retried after his first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. . . .
>
> ". . . A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of *events* subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, con-

duct, and mental and moral propensities.' *Williams* v. *New York*, 337 U. S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources." *Id.*, at 722–723 (emphasis added).

### B

In addition, two of the separate opinions in *Pearce* suggest that the Court did not intend to confine the sentencing authority's consideration to "conduct" occurring subsequent to the first sentencing proceeding. Justice Douglas characterized the Court's holding as allowing a greater sentence to be justified by "events subsequent to the first trial," and by "information that has developed after the initial trial." *Id.*, at 736, and n. 6 (concurring opinion). Justice Black did not refer to a temporal limitation on the information that could be considered. He appeared to believe that the sole requirement imposed by the majority was that the "state courts articulate their reasons for imposing particular sentences." *Id.*, at 741 (opinion concurring in part and dissenting in part).

### C

We find it unnecessary, however, to reconcile these apparent ambiguities. In the two cases before the Court in *Pearce* there was no asserted explanation or justification for the heightened sentence. This case, on the other hand, squarely presents the question of the scope of information that may be relied upon by a sentencing authority to justify an increased sentence after retrial.

We conclude that any language in *Pearce* suggesting that an intervening conviction for an offense committed prior to the original sentencing may not be considered upon sentencing after retrial, is inconsistent with the *Pearce* opinion as a whole. There is no logical support for a distinction between "events" and "conduct" of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned. This is clear from *Williams* v. *New York,* 337 U. S. 241 (1949), which provides that the underlying philosophy of modern sentencing is to take into account the person as well as the crime by considering "information concerning every aspect of a defendant's life." *Id.*, at 250.

Even without a limitation on the type of factual information that may be considered, the requirement that the sentencing authority or prosecutor detail the reasons for an increased sentence or charge enables appellate courts to ensure that a nonvindictive rationale supports the increase. A contrary conclusion would result in the needless exclusion of relevant sentencing information from the very authority in whom the sentencing power is vested. The response of the Court of Appeals to petitioner's argument was entirely correct: "No reason exists for applying a phrase in the *Pearce* guidelines to circumstances bearing no relation to the purpose of those guidelines." 700 F. 2d, at 668.

## IV

We hold that after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings. 395 U. S., at 726.*

*Affirmed.*

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*The Government argues that the "temporal limitation" imposed by *Pearce* on information that may be considered by a sentencing authority is unnecessary to advance the policies underlying that decision. However, the question whether an increased sentence can be justified by reference to an event or conduct occurring before the original sentencing is not presented in this case.

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I join all but Parts II–B and III–B of the Court's opinion. I write to emphasize my view that this case involves a straightforward application of the Court's holding in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). The trial judge applied *Pearce* with commendable care, drawing a distinction at the sentencing stage of the first trial between undecided pending charges and prior convictions. At the sentencing stage following the second trial, the judge stated on the record that "[a]t this time, [petitioner] comes before me with two convictions. Last time, he came before me with one conviction." App. to Pet. for Cert. A–42.

Petitioner insists that this explanation of the increased sentence is insufficient because it does not, in the words of *Pearce*, "concer[n] identifiable *conduct* on the part of the [petitioner] occurring after the time of the original sentencing proceeding." 395 U. S., at 726 (emphasis added). He argues that the "conduct" was his prior crime; not the conviction.

At a different point in *Pearce*, however, the Court stated that "a new sentence, whether greater or less than the original sentence, [may be imposed] in the light of *events* subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, mental and moral propensities.'" *Id.*, at 723 (emphasis added). The difference in language relied upon by petitioner is a matter of semantics—not substance. As the Court of Appeals stated, petitioner's argument would "exal[t] words above substance," 700 F. 2d 663, 667 (1983). When read properly, there simply is no conflict in the *Pearce* language.*

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*Indeed in most situations—such as here—relevant conduct of the defendant is subsumed in the term "events." Of course, there may be subsequent events—as well as subsequent conduct—that are irrelevant to any question of a sentence enhancement. Clearly this is not such a case.

The *Pearce* presumption is not simply concerned with actual vindictiveness, but also was intended to protect against reasonable apprehension of vindictiveness that could deter a defendant from appealing a first conviction. 395 U. S., at 725. Both of these concerns are fully met in this case. It would be difficult to think of an event or occurrence more relevant to the determination of a proper sentence than a criminal conviction obtained in the interim between an original sentencing and a sentencing following retrial.

I view the portions of the Court opinion that I have joined as being fully consistent with the foregoing views.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

Substantially for the reasons expressed by JUSTICE POWELL in his separate opinion, I concur in the judgment.

JUSTICE STEVENS, concurring in the judgment.

The reason I am unable to join the opinion that THE CHIEF JUSTICE has authored is that it interprets *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), as resting entirely on a concern with the actual vindictiveness of the sentencing judge and does not identify the interest in protecting the defendant against the reasonable apprehension of vindictiveness that might deter him from prosecuting a meritorious appeal. See *id.*, at 724–725. "The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.'" *Blackledge* v. *Perry*, 417 U. S. 21, 28 (1974) (quoting *Pearce*, 395 U. S., at 725). What I believe to be the correct reading of *Pearce* is set forth in Judge

Markey's able opinion for the Court of Appeals. See 700 F. 2d 663 (CA11 1983).

Because the flaw in THE CHIEF JUSTICE's opinion infects its Parts II–A and III–C as well as Parts II–B and III–B, I cannot join JUSTICE POWELL's opinion, though I, like JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL, would decide this case on the ground that affirmance of a prior conviction after the initial sentencing constitutes the type of intervening event that may be considered by a trial judge as a ground for enhancing a sentence after a successful appeal.

# BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL. *v.* RUTHERFORD ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-317. Argued March 28, 1984—Decided July 3, 1984

Respondents, pretrial detainees at the Los Angeles County Central Jail, brought a class action in Federal District Court against the County Sheriff and other officials, challenging, on due process grounds, the jail's policy of denying pretrial detainees contact visits with their spouses, relatives, children, and friends, and the jail's practice of conducting random, irregular "shakedown" searches of cells while the detainees were away at meals, recreation, or other activities. The District Court sustained the challenges, and ordered that low risk detainees incarcerated for more than a month be allowed contact visits and that all detainees be allowed to watch searches of their cells if they are in the area when the searches are conducted. The Court of Appeals affirmed.

*Held:*

1. Where it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged practice or policy constitutes punishment or is reasonably related to a legitimate governmental objective. *Bell* v. *Wolfish*, 441 U. S. 520. In considering whether a specific practice or policy is "reasonably related" to security interests, courts should play a very limited role, since such considerations are peculiarly within the province and professional expertise of corrections officials. *Id.*, at 540-541, n. 23. Pp. 583-585.

2. Here, the Central Jail's blanket prohibition on contact visits is an entirely reasonable, nonpunitive response to legitimate security concerns, consistent with the Fourteenth Amendment. Contact visits invite a host of security problems. They open a detention facility to the introduction of drugs, weapons, and other contraband. Moreover, to expose to others those detainees who, as is often the case, are awaiting trial for serious, violent offenses or have prior convictions carries with it the risks that the safety of innocent individuals will be jeopardized. Totally disallowing contact visits is not excessive in relation to the security and other interests at stake. There are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visits such as that imposed here. Nothing in the Constitution requires that detainees be allowed contact visits; responsible, experienced administrators have determined, in their sound

discretion, that such visits will jeopardize the security of the facility and other persons. Pp. 585–589.

3. The Central Jail's practice of conducting random, irregular "shakedown" searches of cells in the absence of the cell occupants is also a reasonable response by the jail officials to legitimate security concerns. *Bell* v. *Wolfish*, *supra*. This is also a matter lodged in the sound discretion of those officials. Pp. 589–591.

710 F. 2d 572, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 592. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 596.

*Frederick R. Bennett* argued the cause and filed briefs for petitioners.

*Alvin J. Bronstein* argued the cause for respondents. With him on the brief were *Edward I. Koren* and *Fred Okrand*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether pretrial detainees have a right guaranteed by the United States Constitution to contact visits and to observe shakedown searches of their cells by prison officials.

## I

Los Angeles County Central Jail is one of seven principal facilities operated by the Sheriff of Los Angeles County. The three-story jail complex, located in downtown Los Angeles, is the largest jail in the country, with a capacity of over 5,000 inmates. It is the primary facility in Los Angeles County for male pretrial detainees, the vast majority of whom remain at the facility at most a few days or weeks while they await trial.

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**Solicitor General Lee* and *Assistant Attorney General Reynolds* filed a brief for the United States as *amicus curiae* urging reversal.

*Peggy C. Davis* filed a brief for the New York City Board of Correction as *amicus curiae* urging affirmance.

In 1975, respondents, pretrial detainees at Central Jail, brought a class action under 42 U. S. C. §§1983, 1985, against the County Sheriff, certain administrators of Central Jail, and the County Board of Supervisors, challenging various policies and practices of the jail and conditions of their confinement. Only respondents' challenges to the policy of the jail denying pretrial detainees contact visits with their spouses, relatives, children, and friends, and to the jail's practice of permitting irregularly scheduled shakedown searches of individual cells in the absence of the cell occupants are before this Court.[1] The District Court sustained both of these challenges. *Rutherford* v. *Pitchess*, 457 F. Supp. 104 (CD Cal. 1978).

The District Court agreed with respondents that "the ability of a man to embrace his wife and his children from time to time during the weeks or months while he is awaiting trial is a matter of great importance to him," *id.*, at 110, yet it recognized that "unrestricted contact visitation would add greatly" to security problems at the jail. *Ibid.* The court ultimately concluded, however, that the danger of permitting *low security risk* inmates to have "physical contact with their loved ones" was not sufficiently great to warrant deprivation of such contact. *Ibid.* Striking what it believed was a "reasonable balance" between the twin considerations of prison security and the constitutional rights of the inmates, the court tentatively proposed to order contact visitation for those inmates who "have received other than high risk classification," and who have been incarcerated for more than two weeks. *Ibid.*

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[1] When respondents instituted this suit, contact visits were not generally allowed. However, all detainees at Central Jail were allowed unmonitored noncontact visits each day between the hours of 8:30 a.m. and 8:30 p.m. It is estimated that there were over 63,000 such visits each month in an air-conditioned visiting area that accommodates 228 visitors at once. Privacy partitions separated each individual visiting location from the others, and clear glass panels separated the inmates from the visitors, who visit over telephones.

Under the search procedures in effect, searches of cells for contraband and other impermissible items were conducted irregularly while the inmates were away from the cells.

With respect to the cell searches, the District Court concluded that allowing inmates to watch from a distance while their cells are searched would allay inmate concerns that their personal property will be unnecessarily confiscated or destroyed. The court concluded that "[f]uture shakedowns should be made while the respective inmates remain outside their cells but near enough to observe the process and raise or answer any relevant inquiry." *Id.*, at 116. The District Court viewed both of its proposed orders as "the least restrictive alternatives consistent with the purpose of [respondents'] incarceration." *Id.*, at 108.

The District Court withheld judgment on all of respondents' complaints pending further evidentiary hearings. In its supplemental memorandum following the additional hearings, the court acknowledged that "many factors strongly militate against the allowing of contact visits," App. to Pet. for Cert. 32, not the least of which being that "establishment of any program of contact visits [would] increase the importation of narcotics into [the] jail, despite all safeguards and precautions." *Id.*, at 31. The court again emphasized that if all or most of the inmates were allowed contact visits, a "great burden" would be imposed on the jail authorities and the public. *Ibid.* Modification of existing visiting areas, if not additional facilities, would be necessary. New procedures for processing visitors—possibly including interviews, personal searches, and searches of all packages carried by the visitors—would be required. Strip searches of inmates following contact visits would be needed.

The court found that the "hardship" on detainees of being unable to "embrace their loved ones" for only a few days or a few weeks could not justify imposition of these substantial burdens. *Id.*, at 32. However, the court believed, the factors rendering contact visitation impracticable for detainees incarcerated for short periods are considerably less compelling when detention is prolonged.

The court reasoned that "the scope, burden and dangers of [a] program [of contact visitation] would be substantially diminished" were contact visitation limited to detainees "who have been in uninterrupted custody for a month or more *and who are not determined to be drug oriented or escape risks,*" and a ceiling imposed on the total number of contact visits that the jail must provide. *Id.*, at 33 (emphasis added). With these limitations, the court suggested, a contact visitation program would require only "[m]odest alteration" of the existing facility. *Ibid.* Alternatively, the court said, the Sheriff could build or occupy a new facility for contact visits and transport inmates back and forth, as necessary.

The District Court also reaffirmed in the supplemental memorandum its earlier conclusion that inmates should be allowed to observe cell searches. The court believed that the interests of the inmates "in protecting their meager possessions outweigh[ed] the small increase in the burden upon the [petitioners]." *Id.*, at 36.[2]

On appeal the Court of Appeals for the Ninth Circuit remanded the case to the District Court for consideration in light of our intervening decision in *Bell* v. *Wolfish*, 441 U. S.

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[2] The District Court ordered that petitioners

"make available a contact visit once each week to each pretrial detainee that has been held in the jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week." App. to Pet. for Cert. 38.

Its order further directed that

"[i]nmates . . . in the general area when a 'shakedown' inspection of their cells is undertaken . . . be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate." *Id.*, at 40.

520 (1979), noting, among other things, that we rejected in *Wolfish* the suggestion that existence of less restrictive means for achievement of security objectives is proof of an exaggerated response to security concerns. App. to Pet. for Cert. 17.

The District Court on remand reaffirmed its prior orders, "[finding] nothing in *Bell* v. *Wolfish* that render[ed] inappropriate any of the . . . challenged orders." *Id.*, at 24. Although the court acknowledged that the Central Jail authorities were not "consciously motivated by a desire to punish," it reiterated its belief that the practices and policies in question were "excessive" in relation to the underlying security objectives. *Id.*, at 25. It characterized petitioners' rejection of all proposals for contact visitation as an "overreaction," *id.*, at 26, which "stem[med] from an unreasonable fixation upon security," *id.*, at 25.

The District Court conceded that *Wolfish* invalidated a similar order requiring that detainees be allowed to observe searches of their cells, but it went on to identify several factors that it thought distinguished its order from that in *Wolfish.*[3]

On petitioner's second appeal, the Court of Appeals affirmed the District Court's orders requiring that certain of the detainees be allowed contact visits and that inmates be allowed to watch searches of their cells.[4] *Rutherford* v.

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[3] Unlike the cell search procedure ordered in *Wolfish*, said the court, the procedure it ordered would not allow inmates to frustrate the search by "'distracting personnel and moving contraband from one room to another ahead of the search team.'" App. to Pet. for Cert. 27 (quoting *Wolfish*, 441 U. S., at 555). Second, the Court of Appeals in *Wolfish* had failed to specify the constitutional provision it relied upon to invalidate the cell search rule under review in that case. In contrast, the District Court noted, it had specifically found that a refusal to allow inmates to observe cell searches violates the Due Process Clause of the Fourteenth Amendment.

[4] The Court of Appeals reversed the third order—not in issue here—which had directed jail officials to reinstall the transparent windows in the cells from which they had been removed.

*Pitchess*, 710 F. 2d 572 (1983). The Court of Appeals held that the District Court's order on contact visitation "fits harmoniously within [the] pattern" of federal cases following *Wolfish* "recogniz[ing] the important security interests of the [penal] institution but at the same time recogniz[ing] the psychological and punitive effects which the prolonged loss of contact visitation has upon detainees . . . ." 710 F. 2d, at 577. It suggested that a blanket prohibition of contact visits for all detainees would be an "unreasonable, exaggerated response to security concerns." *Ibid.*

The Court of Appeals also rejected petitioners' contention that *Wolfish* precluded an order that pretrial detainees be permitted to observe cell searches. The Court of Appeals, as had the District Court, identified "significant differences" between the order invalidated in *Wolfish* and that entered by the District Court.[5]

We granted certiorari because of both the importance of the issue to the administration of detention facilities and the conflict among the Federal Courts of Appeals.[6] 464 U. S. 959 (1983). We reverse.

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[5] The District Court in this case, said the Court of Appeals, had addressed the concerns of the jail officials—ignored by the District Court in *Wolfish*—that inmates could frustrate search efforts by distracting personnel and relocating contraband ahead of the search team. The District Court order here allowed officials to remove inmates from their cells, detain them in a dayroom while a cell row is searched, and bring them in individually to observe only the search of their respective cells. Additionally, while the order in *Wolfish* had rested exclusively on the District Court's conclusion that the searches were "unreasonable" under the Fourth Amendment, the District Court's order in this case was based "largely" upon the Fourteenth Amendment's guarantee of due process.

[6] At least five Circuits have held that pretrial detainees are not constitutionally entitled to contact visits. See *Jordan* v. *Wolke*, 615 F. 2d 749 (CA7 1980); *Ramos* v. *Lamm*, 639 F. 2d 559 (CA10 1980), cert. denied, 450 U. S. 1041 (1981); *Inmates of Allegheny County Jail* v. *Pierce*, 612 F. 2d 754 (CA3 1979); *Feeley* v. *Sampson*, 570 F. 2d 364 (CA1 1978); *Oxendine* v. *Williams*, 509 F. 2d 1405 (CA4 1975) *(per curiam)*. The Ninth Circuit in

## II

The administration of seven separate jail facilities for a metropolitan area of more than seven million people is a task of monumental proportions. Housed in these facilities annually are 200,000 persons awaiting trial and confined because they are unable to meet the requirements for release on bail. Generalizations are of little value, but no one familiar with even the barest outline of the problems of the administration of a prison or jail, or with the administration of criminal justice, could fail to be aware of the ease with which one can obtain release on bail or personal recognizance. The very fact of nonrelease pending trial thus is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility.

Four Terms ago, in *Bell* v. *Wolfish*, 441 U. S. 520 (1979), we considered for the first time, in light of these security concerns, the scope of constitutional protection that must be accorded pretrial detainees. The respondents in *Wolfish* challenged numerous conditions of their confinement at the pretrial detention facility in New York City and various policies and practices of that institution. We held that, where it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, "[f]or under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.*, at 535 (footnote omitted).

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this case, and the Second and Fifth Circuits have held that the Constitution does require contact visits for detainees, at least in certain contexts. See *Marcera* v. *Chinlund*, 595 F. 2d 1231 (CA2), vacated and remanded *sub nom. Lombard* v. *Marcera*, 442 U. S. 915 (1979); *Jones* v. *Diamond*, 636 F. 2d 1364 (CA5), cert. granted *sub nom. Ledbetter* v. *Jones*, 452 U. S. 959, cert. dism'd, 453 U. S. 950 (1981). Cf. *West* v. *Infante*, 707 F. 2d 58 (CA2 1983) *(per curiam)*; *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 580 F. 2d 521 (1978).

In addressing the particular challenges in *Wolfish*, we carefully outlined the principles to be applied in evaluating the constitutionality of conditions of pretrial detention. Specifically, we observed that "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.*, at 538 (citation omitted). Absent proof of intent to punish, we noted, this determination "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.* (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963)). We concluded:

> "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." 441 U. S., at 539 (footnote and citation omitted).

In setting forth these guidelines, we reaffirmed the very limited role that courts should play in the administration of detention facilities. In assessing whether a specific restriction is "reasonably related" to security interests, we said, courts should

> "heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment

in such matters.'" *Id.*, at 540–541, n. 23 (quoting *Pell* v. *Procunier*, 417 U. S. 817, 827 (1974)).

We also cautioned:

> "[P]rison administrators [are to be] accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 441 U. S. at 547 (citing cases).

The principles articulated in *Wolfish* govern resolution of this case.

## III

### A

Petitioners' first contention is that it was error to conclude that even low risk detainees incarcerated for more than a month are constitutionally entitled to contact visits from friends and relatives. Petitioners maintain, as they have throughout these proceedings that, in the interest of institutional and public security, it is within their discretion as officials of a detention facility to impose an absolute prohibition on contact visits.[7] The District Court did not find, nor did the Court of Appeals suggest, that the purpose of petitioners' policy of denying contact visitation is to punish the inmates. To the contrary, the District Court found that petitioners are fully cognizant of the possible value of contact visitation, and it commended petitioners for their conscientious efforts to accommodate the large numbers of inmates at Central Jail.

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[7] We did not have occasion to address specifically the issue of contact visitation in *Wolfish*. We did suggest, however, that prohibiting contact visitation might well represent a permissible alternative to the admittedly intrusive body cavity searches there challenged. 441 U. S., at 559–560, n. 40. We subsequently vacated and remanded for consideration in light of *Wolfish* a Second Circuit decision holding that the denial of contact visits was unconstitutional. *Marcera* v. *Chinlund*, 595 F. 2d 1231, vacated and remanded *sub nom. Lombard* v. *Marcera*, 442 U. S. 915 (1979). The issue was presented for review in *Jones* v. *Diamond*, *supra*. However, that case was ultimately dismissed pursuant to this Court's Rule 53. 453 U. S. 950 (1981).

The question before us, therefore, is narrow: whether the prohibition of contact visits is reasonably related to legitimate governmental objectives. More particularly, because there is no dispute that internal security of detention facilities is a legitimate governmental interest,[8] our inquiry is simply whether petitioners' blanket prohibition on contact visits at Central Jail is reasonably related to the security of that facility.

That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion. The District Court acknowledged as much. Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.

Contact visitation poses other dangers for a detention facility, as well. Detainees—by definition persons unable to meet bail—often are awaiting trial for serious, violent offenses, and many have prior criminal convictions. Exposure of this type person to others, whether family, friends, or jail administrators, necessarily carries with it risks that the safety of innocent individuals will be jeopardized in various ways. They may, for example, be taken as hostages or become innocent pawns in escape attempts. It is no answer, of course, that we deal here with restrictions on pretrial detainees rather than convicted criminals. For, as we observed in *Wolfish,* in this context, "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." 441 U. S., at 546, n. 28. Indeed, we said, "it may be that in certain circumstances [detainees] present a greater risk to jail security and order." *Ibid.*

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[8] In *Wolfish* itself, we characterized the maintenance of security, internal order, and discipline as "essential goals," which at times require the "limitation or retraction of . . . retained constitutional rights." 441 U. S., at 546. Government, we said, "must be able to take steps to maintain security and order at [an] institution and make certain no weapons or illicit drugs reach detainees." *Id.*, at 540. See also *Pell* v. *Procunier*, 417 U. S. 817, 823 (1974).

The District Court and Court of Appeals held that totally disallowing contact visits is excessive in relation to the security and other interests at stake. We reject this characterization. There are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visitation such as that imposed here. It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identification are substantial. The burdens of identifying candidates for contact visitation—glossed over by the District Court—are made even more difficult by the brevity of detention and the constantly changing nature of the inmate population. Or a complete prohibition could reasonably be thought necessary because selectively allowing contact visits to some—even if feasible—could well create tension between those allowed contact visits and those not.

In *Wolfish,* we sustained against a Fourth Amendment challenge the practice of conducting routine body cavity searches following contact visits, even though there had been only one reported attempt to smuggle contraband into the facility in a body cavity. 441 U. S., at 558–560. The purpose of the cavity searches in *Wolfish* was to discover and deter smuggling of weapons and contraband, which was found to be a byproduct of contact visits. Given the security demands and the need to protect not only other inmates but also the facility's personnel, we did not regard full body cavity searches as excessive. Petitioners' flat prohibition on contact visits cannot be considered a more excessive response to the same security objectives. See *id.*, at 559–560, n. 40. In any event, we have emphasized that we are unwilling to substitute our judgment on these difficult and sensitive matters of institutional administration and security for that of "the persons who are actually charged with and trained in the running," *id.*, at 562, of such facilities.[9] In sum, we conclude that petitioners' blanket prohibition is an entirely reasonable, nonpunitive response to the legitimate security concerns identified, consistent with the Fourteenth Amendment.

The District Court acknowledged that "many factors strongly militate against the allowing of contact visits." App. to Pet. for Cert. 32. The court appears to have accepted petitioners' testimony that contact visits significantly increase the possibility that there will be breaches of security and that the safety of others will be placed in jeopardy. It noted that, "despite all safeguards and precautions," *id.*, at 31, any program of contact visitation would inevitably increase importation of narcotics into the jail. We can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country. While explicitly acknowledging the security risks that inhere in even a limited program of contact visitation, the District Court nonetheless invalidated petitioners' practice of denying contact visitation.

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[9] The reasonableness of petitioners' blanket prohibition is underscored by the costs—financial and otherwise—of the alternative response ordered by the District Court. Jail personnel, whom the District Court recognized are now free from the "complicated, expensive, and time-consuming process[es]" of interviewing, searching, and processing visitors, App. to Pet. for Cert. 31, would have to be reassigned to perform these tasks, perhaps requiring the hiring of additional personnel. Intrusive strip searches after contact visits would be necessary. Finally, as the District Court noted, at the very least, "modest" improvements of existing facilities would be required to accommodate a contact visitation program if the county did not purchase or build a new facility elsewhere. These are substantial costs that a facility's administrators might reasonably attempt to avoid.

On this record, we must conclude that the District Court simply misperceived the limited scope of judicial inquiry under *Wolfish*. When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in *Wolfish*, "[i]t is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the jail] officials about the extent of the security interests affected and the means required to further those interests." 441 U. S., at 554.

In rejecting the District Court's order, we do not in any sense denigrate the importance of visits from family or friends to the detainee. Nor do we intend to suggest that contact visits might not be a factor contributing to the ultimate reintegration of the detainee into society. We hold only that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.

### B

It has been the petitioners' practice, as it is of all such facilities, to conduct irregular or random "shakedown" searches of the cells of detainees while the detainees are away at meals, recreation, or other activities. Respondents do not dispute the need for these searches; they challenge the searches only to the extent that detainees are not permitted to observe them.

Petitioners respond that their method of conducting cell searches is a security measure virtually identical to that challenged in *Wolfish*. See 441 U. S., at 555–557.[10] We agree. The Court described the practice in *Wolfish* as follows:

> "The MCC staff conducts unannounced searches of inmate living areas at irregular intervals. These searches generally are formal unit 'shakedowns' during which all inmates are cleared of the residential units, and a team of guards searches each room. . . . [I]nmates [are] not permitted to watch the searches." *Id.*, at 555.

The search practices described are essentially identical to those employed at Central Jail, see n. 1, *supra*.

Respondents attempt to distinguish *Wolfish* principally on the ground that the District Court's order invalidated in *Wolfish* rested on the Fourth Amendment, while the District Court's order here was predicated on its holding that searches in the absence of the detainees violate their rights under the Due Process Clause of the Fourteenth Amendment. We did hold in *Wolfish* that the room search rule challenged did not violate the Fourth Amendment. But we also explicitly rejected the contention that the room search rule, including the feature of the rule prohibiting observation of the searches by the detainees, violated the detainees' *due process* rights:

> "Nor do we think that the four MCC security restrictions and practices described in Part III, *supra* [one of which was the rule permitting room searches in the absence of the detainees] constitute 'punishment' in viola-

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[10] Petitioners also note that the District Court's order in this case is indistinguishable in any material respect from that invalidated in *Wolfish*. This is essentially correct, although the order here is more limited in that it requires only that those detainees in the general vicinity of their cells at the time of the shakedowns, not all detainees, be allowed to observe the search of their cells. In this context, however, where deference to institutional administrators is the touchstone and administrators are not required to employ the least restrictive means available, these are not differences of constitutional magnitude.

> tion of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment." 441 U. S., at 560–561 (footnote omitted).

We held that all of the restrictions "were reasonable responses by [the] officials to legitimate security concerns." *Id.*, at 561.

Thus, contrary to respondents' suggestion, we have previously considered not only a Fourth Amendment challenge but also a due process challenge to a room search procedure almost identical to that used at Central Jail, and we sustained the practice on both scores. We have no reason to reconsider that issue; the identical arguments made by respondents here were advanced by the respondents in *Wolfish*. The security concerns that we held justified the same restriction in *Wolfish*, see *id.*, at 555, n. 36, are no less compelling here.[11] Moreover, we could not have been clearer in our holding in *Wolfish* that this is a matter lodged in the sound discretion of the institutional officials. We reaffirm that "proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees." *Id.*, at 557, n. 38.[12]

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[11] The District Court and Court of Appeals also sought to distinguish the order here from that entered in *Wolfish* on the ground that the order in this case accommodated the institutional concern that inmates not distract personnel during the search and succeed in moving contraband before guards arrive at a particular cell. This factual distinction is without legal significance. In effect, the order here merely attempts to impose on officials the least restrictive means available for accomplishment of their security objectives. We reaffirm that administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives. *Wolfish*, 441 U. S., at 542, n. 25.

[12] To the extent that respondents' brief in this Court can be read to raise a procedural due process challenge to petitioners' cell-search procedure—a claim not made in *Wolfish*—we reject the challenge. The governmental

Accordingly, the judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that neither the contact-visitation policy nor the cell-search policy at issue in this case violates respondents' due process rights under the Fourteenth Amendment. I write separately, however, because I do not believe that the Court adequately has addressed the gravamen of respondents' constitutional claims.

1. I disagree with the Court's treatment of the contact-visitation issue chiefly because, in my view, the Court has invoked principles of judicial deference to administrative judgment that have no place in the present litigation. As the Court made clear in *Bell* v. *Wolfish*, 441 U. S. 520 (1979), and as it reaffirms here, a pretrial detainee who challenges conditions of confinement on the ground that they amount to punishment in violation of the Due Process Clause must show that the conditions are the product of punitive intent. See *id.*, at 538–539, and nn. 19 and 20, and *ante*, at 584. When a detainee attempts to demonstrate the existence of punitive intent, either through direct proof of motive or through a demonstration that the challenged conditions are not "reasonably related to a legitimate governmental objective," 441 U. S., at 539, he necessarily is calling into question the good faith of prison administrators. Under those circumstances, it seems to me to be somewhat perverse to insist that a court assessing the rationality of a particular administrative prac-

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interests in conducting the search in the absence of the detainees, see, *e. g.*, *Wolfish*, *supra*, at 555–556, and n. 36—a complex undertaking under optimal conditions in a 5,000-inmate institution—exceed whatever possessory interests of the detainees might be implicated by the search. Moreover, we believe that the risks of erroneous deprivations of property under petitioners' procedure are minimal.

tice must accord prison administrators "'wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" *Ante*, at 585, quoting *Bell* v. *Wolfish*, 441 U. S., at 547. Such a requirement boils down to a command that when a court is confronted with a charge of administrative bad faith, it must evaluate the charge by assuming administrative *good* faith.

When a constitutional challenge to prison conditions necessarily places the good faith of prison administrators at issue, I regard it as improper to make the plaintiff prove his case twice by requiring a court to defer to administrators' putative professional judgment. Instead, I think it sufficient to rest on the substantive due process standard announced in *Bell* v. *Wolfish* itself: absent direct proof of punitive intent, "a court permissibly may infer that the purpose of [a challenged] governmental action is punishment" if, but only if, the action "is not reasonably related to a legitimate goal." *Id.*, at 539. The requirement that prison policies be reasonably related to a legitimate goal is hardly a stringent one, and, for many of the reasons given by the Court, *ante*, at 586–587, I have no doubt that the requirement has been met on the record presented here. I therefore am mystified by the Court's insistence on invoking principles of judicial deference, since those principles are not only inappropriate but entirely unnecessary to the result in this case.

More generally, I am concerned about the Court's apparent willingness to substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting. See *Rhodes* v. *Chapman*, 452 U. S. 337, 369 (1981) (opinion concurring in judgment). Courts unquestionably should be reluctant to second-guess prison administrators' opinions about the need for security measures; when constitutional standards look in whole or in part to the effectiveness of administrative practices, good-faith administrative judgments are entitled to substantial weight. The fact that particular measures advance prison security, however, does not make them *ipso facto* constitutional. Cf. *Bell* v. *Wolfish*, 441 U. S., at 539, n. 20. I recognize that constitutional challenges to prison conditions, like similarly expansive challenges to the workings of other institutions, pose a danger of excessive judicial intervention. At the same time, however, careless invocations of "deference" run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a "hands off" approach. As we recognized in *Bell* v. *Wolfish*, the fact that initial responsibility for the Nation's prisons is vested in prison administrators "does not mean that constitutional rights are not to be scrupulously observed." *Id.*, at 562. It is only because I am satisfied that the contact-visitation policy satisfies this standard under the Due Process Clause that I join the Court's judgment.

2. The Court's treatment of the cell-search policy misconstrues respondents' claim. The Court assumes that respondents are challenging their exclusion from cell searches on substantive due process grounds and hence that the decision in *Bell* v. *Wolfish* is dispositive. *Ante*, at 590–591. It is quite clear, however, that respondents are challenging the cell-search policy on *procedural* due process grounds. See Tr. of Oral Arg. 38 ("[T]his is a procedural due process issue . . . rather than [an issue of] freedom from punishment as a matter of substantive due process"); Brief for Respondents 33–36. In essence, respondents are arguing that cell searches result in the deprivation of their personal property and that the process due them under the Fourteenth Amendment includes an opportunity to observe cell searches in order to minimize erroneous deprivations. Because the Court did not address a procedural due process claim in *Bell* v. *Wolfish*, something more must be said to support the judgment in this case.

Under *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), the adequacy of governmental procedures that accompany deprivations of property normally depends on a balance of three factors: the private interest that will be affected by the official action, the risk that the existing procedures will result in an erroneous deprivation and the probable value of additional procedural safeguards, and the governmental interest in relying on the challenged procedures. *Id.*, at 335. Here, I do not dispute that the private interests at stake in cell searches are potentially significant. See *Hudson* v. *Palmer*, *ante*, at 521, 524–525 (opinion of the Court), 553–554 (STEVENS, J., concurring in part and dissenting in part). Nor is it possible to maintain that a pretrial detainee's presence never would contribute to the avoidance of erroneous deprivations. We noted in *Bell* v. *Wolfish* that the "prevent[ion of] theft or misuse by those conducting the search" was a "conceivable beneficial effect" of allowing detainees to observe cell searches, 441 U. S., at 557, and the District Judge in this case witnessed a search in which a prisoner was able to prevent the mistaken seizure of two magazines from his cell by explaining why they complied with prison regulations. App. to Pet. for Cert. 36.

The countervailing governmental interests in conducting cell searches outside the presence of pretrial detainees, however, are substantial enough to persuade me that the Court of Appeals erred in its due process determination. First, there is no reason to think that "friction between the inmates and security guards," *Bell* v. *Wolfish*, 441 U. S., at 555, is any less likely to result from the presence of detainees here than it was in *Bell* v. *Wolfish* itself. Second, and more significant, detainees may well learn where to hide contraband if they are allowed to watch searches of their cells. As a result, although the requirement of a detainee's presence during the course of a search may not prevent the seizure of contraband during the search itself, cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 (1974), it may frustrate future searches of the same detainee's cell. Quite apart from security concerns, moreover, there undoubtedly are "administrative burdens [entailed by] the additional or substitute procedural requirement." *Mathews* v. *Eldridge*, 424 U. S., at 335. For example, as petitioners point out, the jail now would be required to dedicate an increased number of guards to the task of accompanying each detainee from a holding area to his cell while the search is being conducted. Just as different exigencies have excused the requirement of predeprivation hearings in other contexts, see, *e. g.*, *Commissioner* v. *Shapiro*, 424 U. S. 614, 629–630, and n. 12 (1976); *Calero-Toledo*, 416 U. S., at 676–680; *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 315–316 (1908), so do these considerations tip the balance against a *de facto* predeprivation "hearing" for pretrial detainees here. It is for this reason that I join the judgment of the Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

This case marks the fourth time in recent years that the Court has turned a deaf ear to inmates' claims that the conditions of their confinement violate the Federal Constitution. See *Rhodes* v. *Chapman*, 452 U. S. 337 (1981); *Bell* v. *Wolfish*, 441 U. S. 520 (1979); *Hudson* v. *Palmer*, *ante*, p. 517. Guided by an unwarranted confidence in the good faith and "expertise" of prison administrators and by a pinched conception of the meaning of the Due Process Clauses and the Eighth Amendment, a majority of the Court increasingly appears willing to sanction any prison condition for which the majority can imagine a colorable rationale, no matter how oppressive or ill-justified that condition is in fact. So, here, the Court upholds two policies in force at the Los Angeles County Central Jail. Under one, a pretrial detainee is not permitted any physical contact with members of his family, regardless of how long he is incarcerated pending his trial or how slight is the risk that he will abuse a visitation privilege. Under the other, detainees are not allowed to observe searches of their cells, despite the fact that such searches frequently result in arbitrary destruction or confiscation of the detainees' property. In my view, neither of these policies comports with the Constitution.

## I

In *Bell* v. *Wolfish*, *supra*, the Court established a set of principles defining constitutionally permissible treatment of incarcerated persons who have not been convicted of crimes. In the years since *Wolfish*, I have not abandoned my view that the Court's decision in that case was fundamentally misconceived. See 441 U. S., at 563–579 (MARSHALL, J., dissenting). However, even if I thought the doctrine enunciated in *Wolfish* was defensible, I could not abide the manner in which the majority construes and applies that doctrine to dispose of respondents' challenge to the jail's rule against contact visitation.

One of the premises of the principal holding in *Wolfish* was that the plaintiffs' claims did not implicate any "fundamental liberty interests" such as those "delineated in . . . *Roe* v. *Wade*, 410 U. S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); [and] *Meyer* v. *Nebraska*, 262 U. S. 390 (1923)." *Id.*, at 534–535. Aside from the right not to be punished prior to adjudication of guilt, the only general interest that could be asserted by the plaintiffs in *Wolfish*, the Court contended, was a "desire to be free from discomfort." *Id.*, at 534.[1] The comparatively unimportant nature of that interest made it possible for the Court to adopt a deferential legal standard: "[A] particular condition or restriction of pretrial detention" passes muster under the Due Process Clause as long as it "is reasonably related to a legitimate governmental objective," *id.*, at 539.

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[1] The *Wolfish* plaintiffs did assert various other rights in challenging specific conditions in their prison. See, *e. g.*, 441 U. S., at 548–552 (First Amendment); *id.*, at 555–557 (Fourth Amendment). But the Court did not consider those particular interests in formulating its general standard

The Court today reiterates and relies on the foregoing test. *Ante*, at 586. In so doing, however, the Court ignores a crucial difference between the interests at stake in *Wolfish* and in this case. Unlike the *Wolfish* plaintiffs, respondents can and do point to a fundamental right abridged by the jail's policy—namely, their freedom to engage in and prevent the deterioration of their relationships with their families.

The importance of the right asserted by respondents was acknowledged by the District Court. "[T]he ability of a man to embrace his wife and his children from time to time during the weeks or months while he is awaiting trial," the court found, "is a matter of great importance to him." *Rutherford* v. *Pitchess*, 457 F. Supp. 104, 110 (1978).[2] Denial of contact visitation, the court concluded, is "very traumatic treatment." App. to Pet. for Cert. 25. Substantial evidence in the record supports the District Court's findings. William Nagel, an expert in the field of corrections, testified that contact visitation was crucial in allowing prisoners to maintain their familial bonds. Tr. 4174–4175. Similarly, Dr. Terry Kupers, a psychiatrist, testified that denial of contact visitation contributes to the breakup of prisoners' marriages and generally threatens their mental health. *Id.*, at 4647–4651.

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(on which the Court relies today) for determining the constitutionality, under the Due Process Clause, of the treatment of pretrial detainees. See *id.*, at 530, 534–535.

[2] It should be stressed that, while most of the jail inmates are detained for only brief periods of time (and thus are not covered by the District Court's order), some are detained for very substantial periods. For example, plaintiffs Rutherford and Taylor were held in the jail pending their trials for 38 months and 32 months, respectively. App. 53.

The secondary literature buttresses these assertions,[3] as do the conclusions reached by other courts.[4]

The significant injury to familial relations wrought by the jail's policy of denying contact visitation means that that policy must be tested against a legal standard more constraining than the rule announced in *Wolfish.* Our cases leave no doubt that persons' freedom to enter into, maintain, and cultivate familial relations is entitled to constitutional protection. *E. g., Santosky* v. *Kramer,* 455 U. S. 745, 753 (1982). Among the relationships that we have expressly shielded from state interference are bonds between spouses, see *Zablocki* v. *Redhail,* 434 U. S. 374 (1978), and between parents and their children, see *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972); *Stanley* v. *Illinois, supra.* The special status of these relationships in our constitutional scheme derives from several considerations: the fact that traditionally they have been regarded as sacrosanct,[5] the important role they have played in fostering diversity and pluralism in our culture,[6] and their centrality to the emotional life of many persons.[7]

Determination of exactly how the doctrine established in the aforementioned cases bears upon a ban on contact visitation by pretrial detainees would be difficult. On the one hand, it could be argued that the "withdrawal or limitation of many privileges and rights" that necessarily accompanies incarceration, *Price* v. *Johnston*, 334 U. S. 266, 285 (1948), combined with the fact that the inmates' familial bonds are not altogether severed by such a ban, means that something less than a "compelling" government interest would suffice to legitimate the impairment of the inmates' rights.[8] On the other hand, two factors suggest that only a very important public purpose could sustain the policy. First, even persons lawfully incarcerated after being convicted of crimes retain important constitutional rights;[9] presumptively innocent persons surely are entitled to no less.[10] Second, we have previously insisted upon very persuasive justifications for government regulations that significantly, but not prohibitively, interfered with the exercise of familial rights;[11] arguably, a similarly stringent test should control here. However, a sensitive balancing of these competing considerations is unnecessary to resolve the case before us. At a minimum, petitioners, to prevail, should be required to show that the jail's policy materially advances a substantial government interest. Petitioners have not made and, on this record, could not make such a demonstration.[12]

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[3] See, *e. g.*, Zemans & Cavan, Marital Relationships of Prisoners, 49 J. Crim. L., C. & P. S. 50 (1958); Note, On Prisoners and Parenting: Preserving the Tie that Binds, 87 Yale L. J. 1408, 1416, 1424 (1978).

[4] See *Jones* v. *Diamond*, 636 F. 2d 1364, 1377 (CA5), cert. granted *sub nom. Ledbetter* v. *Jones*, 452 U. S. 959, cert. dism'd, 453 U. S. 950 (1981); *Boudin* v. *Thomas*, 533 F. Supp. 786, 792–793 (SDNY 1982) (pointing out, *inter alia*, that, when an inmate's child is too young to talk, denial of contact visitation is the equivalent of denial of any visitation whatsoever); *Rhem* v. *Malcolm*, 371 F. Supp. 594, 602–603 (SDNY), aff'd, 507 F. 2d 333 (CA2 1974).

[5] See *Bellotti* v. *Baird*, 443 U. S. 622, 638 (1979) (plurality opinion); *Meyer* v. *Nebraska*, 262 U. S. 390, 402 (1923).

[6] See *Moore* v. *East Cleveland*, 431 U. S. 494, 506 (1977) (plurality opinion); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925).

[7] See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 844 (1977); *Stanley* v. *Illinois*, 405 U. S. 645, 652 (1972).

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[8] Cf. *Schall* v. *Martin*, 467 U. S. 253, 291, n. 15 (1984) (MARSHALL, J., dissenting) (suggesting a test under which "the strength of the state interest needed to legitimate a statute [would depend] upon the *degree* to which the statute encroaches upon fundamental rights") (emphasis in original; citation omitted); *Bell* v. *Wolfish*, 441 U. S. 520, 569–571 (1979) (MARSHALL, J., dissenting).

[9] See, *e. g.*, *Procunier* v. *Martinez*, 416 U. S. 396 (1974) (freedom of speech); *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)* (equal protection of the laws); cf. *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country").

[10] Cf. *Bell* v. *Wolfish*, *supra*, at 535, n. 16 (pretrial detainees, unlike sentenced inmates, may not be punished).

[11] See, *e. g.*, *Zablocki* v. *Redhail*, 434 U. S. 374, 387 (1978) (invalidating a statute that, as applied to most persons, seriously intruded upon, but did not abrogate, the right to marry); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 640 (1974) (striking down administrative regulations that imposed a "heavy burden" on teachers' right to have children).

It should be emphasized that what petitioners must defend is not their reluctance to allow *unlimited* contact visitation, but rather their refusal to adopt the specific reforms ordered by the lower courts. The District Court's order, it should be recalled, was carefully circumscribed:

> "Commencing not more than ninety days following the date of this order, the defendants will make available a contact visit once each week to each pretrial detainee that has been held in the jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided, however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The lengths of such visits shall remain in the discretion of the Sheriff." App. to Pet. for Cert. 38.

Petitioners object to this order, and defend their current rule prohibiting all contact between inmates and their families, on two main grounds. Neither of the proffered justifications survives scrutiny.

First, petitioners contend that a ban on contact visitation is necessary to prevent the introduction into the jail of drugs and weapons. It must be admitted that this is a legitimate and important goal. However, petitioners fail to show that its realization would be materially impaired by adoption of the reforms ordered by the District Court. Indeed, evidence adduced at trial establishes the contrary. Several witnesses testified that security procedures could be implemented that would make importation of contraband very difficult. Among the precautions effectively used at other institutions are: searches of prisoners before and after visits; dressing of prisoners in special clothes for visitation; examination of prisoners and visitors with metal detectors and fluoroscopes; exclusion of parcels from the visiting area; rejection of visitors who do not comply with visiting rules; and continuous observation of the visiting area by guards. *E. g.*, Tr. 4164–4166, 4232, 4576–4577.[13] Mr. Nagel testified that these procedures would "prevent everything except the most extreme methods of introducing drugs into the institution." *Id.*, at 4170. Further protection against the transmission of contraband from visitors to inmates is provided by the District Court's restriction of its order to inmates who have been classified as low risk. In short, there is no reason to think that compliance with the lower courts' directive would result in more than a negligible increase in the flow of drugs or weapons into the jail.[14]

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[12] Respondents contend that, even if this case were controlled by the standard enunciated in *Wolfish*, they should prevail, because petitioners have not advanced even a "legitimate governmental objective" in support of the jail's policy. Because of the manner in which I approach the case, I need not address respondents' argument on this score.

Second, petitioners contend that allowance of contact visitation would endanger innocent visitors who are placed in near proximity to dangerous detainees. Again, though the importance of the objective is apparent, the nexus between it and the jail's current policy is not. As indicated above, the District Court's order applies only to detainees who are unlikely to try to escape. And security measures could be employed by petitioners that would make it very difficult for inmates to hurt or take advantage of visitors. See *supra*, at 602. Finally, the administrators of other institutions that have long permitted contact visits between inmates and their families testified at trial that violent incidents resulting from such visitation are rare, apparently because inmates value their visitation privileges so highly.[15]

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[13] The majority implies that the intrusiveness of some of these measures provides an additional justification for petitioners' refusal to allow any contact visitation. See *ante*, at 588, n. 9. It is possible that some inmates or visitors might decide to forgo visitation rather than submit to such procedures, but surely the choice should be left to them.

[14] It should be pointed out that drugs and weapons enter the jail in significant quantities through several other routes. See Tr. 3307, 4526–4527; cf. *id.*, at 4589–4590, 4624–4625 (describing similar problems at other institutions). It would thus be a mistake to think that the jail is currently free of contraband, and that the small amounts that might enter the facility through contact visitation would infect the facility for the first time.

The majority seeks to shore up petitioners' two arguments with miscellaneous subsidiary claims. In an effort to discredit the limitations on the District Court's order, the majority argues that determination of which inmates have a sufficiently low propensity to misbehave would be difficult and time-consuming, especially in light of "the brevity of detention and the constantly changing nature of the inmate population." *Ante*, at 587. This contention is rebutted by the District Court's finding that, after an inmate has been incarcerated for a month, jail officials have considerable information regarding his background and behavior patterns, and by evidence in the record that the jail already has a classification system that, with some modification and improvement, could be used to evaluate detainees' propensities for escape and drug abuse. App. to Pet. for Cert. 33.[16] Next, the majority contends that compliance with the District Court's order would be expensive. *Ante*, at 588, n. 9. Again, the District Court's findings are decisive; the court found that only "modest" changes in the jail facilities would be required. App. to Pet. for Cert. 33. More fundamentally, a desire to run a jail as cheaply as possible is not a legitimate reason for abridging the constitutional rights of its occupants. Finally, the majority suggests that the District Court's order might cause some dissension in the jail, because inmates denied visitation privileges would resent those granted such privileges. *Ante*, at 587. There is no evidence whatsoever in the record to support this speculative observation.

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[15] For example, Arnett Gaston, Warden of the New York City Men's House of Detention (Riker's Island), testified that significant physical confrontations have been largely absent from his facility. *Id.*, at 4368. Lloyd Patterson, Superintendent of Deuel Vocational Institution for 10 years, testified that he could recall only three or four incidents during that period. *Id.*, at 4589. Mr. Nagel, drawing on his 11 years of experience in the New Jersey prison system and visits to more than 350 other institutions, corroborated those observations. *Id.*, at 4167–4168.

[16] Lieutenant Thomas Lonergan testified at trial that, at present, the identities and backgrounds of 70% of the inmates are ascertained within three weeks of their admission. *Id.*, at 4450–4451.

In sum, neither petitioners nor the majority have shown that permitting low-risk pretrial detainees who have been incarcerated for more than a month occasionally to have contact visits with their spouses and children would frustrate the achievement of any substantial state interest.[17] Because such visitation would significantly alleviate the adverse impact of the jail's current policies upon respondents' familial rights, its deprivation violates the Due Process Clause.

## II

The majority brusquely rejects respondents' challenge to the jail's policy of refusing to permit detainees to observe searches of their cells on the ground that respondents' claim is foreclosed by the decision in *Wolfish.* If respondents' claim were indeed identical to that presented by the *Wolfish* plaintiffs, I would vote to affirm on this issue for the reasons stated in my dissenting opinion in *Wolfish.* See 441 U. S., at 576. In fact, however, the two cases differ in a crucial respect, and that difference provides an independent ground for sustaining the judgment below.

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[17] The feasibility of the limited contact visitation program ordered by the District Court is further suggested by the number of other institutions that have similar programs. Approximately 80% of the inmates in the California prison system are permitted contact visitation. *Id.*, at 4587. It appears that the current policy of the Federal Bureau of Prisons is to allow visitation privileges to both convicted inmates and pretrial detainees. See *id.*, at 1955. In New York City, all except identifiably dangerous pretrial detainees are permitted contact visits with their families. *Id.*, at 4339, 4362. (Indeed, the agency that oversees the operation of the city's detention facilities has filed a brief contending that contact visitation is feasible and that its denial must be deemed punitive. Brief for New York City Board of Correction as *Amicus Curiae* 9–29.)

The Court in *Wolfish* held that the policy adopted by the Metropolitan Correctional Center of not allowing pretrial detainees to observe searches of their cells did not violate the Fourth Amendment and did not constitute punishment violative of the Due Process Clause. *Id.*, at 556–557, 560–561. Respondents in this case make a quite different claim. They assert that the Central Jail's policy of searching cells and confiscating or destroying personal possessions found therein, without allowing inmates to observe those searches, deprives inmates of property without due process of law. On the record before us, I think respondents' claim is meritorious.

One of the purposes of the Due Process Clause is to reduce the incidence of error in deprivations of life, liberty, or property. See *Fuentes* v. *Shevin*, 407 U. S. 67, 80–81 (1972). One of the ways such error can be reduced, in turn, is by allowing persons whose interests may be affected adversely by government decisions to participate in those decisions. In *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), the Court identified a complex of considerations that are helpful in determining whether the Constitution mandates such participation in particular contexts:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute proce-

> dural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

Application of these factors to the facts of the instant case provides strong support for the judgment of the courts below. As the District Court aptly observed, the private interests affected by the jail's cell-search procedure are important. "The possessions that a man is allowed to keep in his cell are meager indeed, being limited to things like a few pictures, magazines, cigarettes, candy bars, and perhaps an extra pair of socks. Nonetheless, these items are cherished by the inmates." App. to Pet. for Cert. 27–28.[18] Next, the District Court found that the risk, under the jail's current policy, that inmates' possessions will be destroyed unnecessarily is substantial. Unannounced shakedown searches inevitably are somewhat hasty, and the officers conducting them have significant discretion in deciding what to leave and what to confiscate. *Id.*, at 28. If allowed to observe the process, inmates can persuade the officers to preserve possessions that would otherwise be destroyed. *Ibid.*[19] Finally, to allow detainees to witness searches of their cells would impose only slight burdens on the jail officials. In response to the District Court's original order, petitioners developed alternative methods of conducting shakedown searches, each of which made it possible for inmates to be present. One of those procedures, known as "Method C," proved to be no less effectual, no more time-consuming, and only slightly more expensive than the practice challenged by respondents.[20] The demonstrated feasibility[21] and minor cost of this option renders indefensible, in my view, petitioners' insistence that detainees not be permitted to observe cell searches.

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[18] Cf. *Hudson* v. *Palmer*, *ante*, at 542 (STEVENS, J., concurring in part and dissenting in part) ("Personal letters, snapshots of family members, a souvenir, a deck of cards, a hobby kit, perhaps a diary or a training manual for an apprentice in a new trade, or even a Bible—a variety of inexpensive items may enable a prisoner to maintain contact with some part of his past and an eye to the possibility of a better future").

[19] This last finding is based in part on the District Court Judge's visit to the jail:

"My own limited observation, as is mentioned in my memorandum of February 15, 1979, revealed an instance upon which the opportunity for a prisoner to make a plea or an explanation on his own behalf resulted in saving his property from confiscation. It was obvious that this fact meant a good deal to him, and I believe that the incident justifies a significant generalization." App. to Pet. for Cert. 28; see *id.*, at 36.

In sum, this seems a classic instance in which an "established state procedure," as distinguished from "a random and unauthorized act by a state employee," has the effect of causing unnecessary deprivations of private property. Compare *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 435–436 (1982), with *Hudson* v. *Palmer*, *ante*, p. 517, and *Parratt* v. *Taylor*, 451 U. S. 527, 541 (1981). In view of the ease with which petitioners could implement an alternative procedure that would reduce the incidence of wanton destruction of inmates' possessions, I would affirm the judgment of the courts below that the jail's current practice violates the Due Process Clause.[22]

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[20] The District Court described this procedure, and compared it with the jail's present policy, as follows:

"Method A involved searching all of the cells in a row while the inmates remained in the day room, which is the manner in which searches currently are conducted. In Method C, the men occupying a particular cell were brought from the day room and stood outside their cell while it was being searched. When such search was completed, the men were locked in their cell and the remaining cells were searched successively in the same manner. Methods B and D are so unsatisfactory and expensive that no further comment concerning them is indicated.

"According to the statistics reported by the defendants, Methods A and C take substantially the same amount of time, and C is slightly more expensive, due to the need to utilize a few more deputies to escort the prisoners and to insure against assault upon the deputies that are engaged in searching the cell." *Id.*, at 35–36; see Tr. 4122–4143 (testimony of Deputy Sheriff Lombardi).

[21] In their brief, petitioners object to Method C on one ground they did not press below. Relying on a single comment made at trial by Deputy Sheriff Lombardi, petitioners contend that detainees, if allowed to observe cell searches, would learn where they could hide contraband with impunity. *Id.*, at 4116. Deputy Lombardi offered no substantiation for her prediction and indeed, when summarizing petitioners' objections to Method C, did not consider this point important enough even to mention. See *id.*, at 4132–4133. Especially in the absence of any finding on this issue by the District Court, petitioners' bald contention seems to me entitled to little weight.

I respectfully dissent.

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[22] Cf. *Hudson* v. *Palmer*, *ante*, at 541, n. 4 (STEVENS, J., concurring in part and dissenting in part) (observing that the holding of the Court in *Hudson* does not cover "cases in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property").

# ROBERTS, ACTING COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN RIGHTS, ET AL. *v.* UNITED STATES JAYCEES

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83–724. Argued April 18, 1984—Decided July 3, 1984

Appellee United States Jaycees is a nonprofit national membership corporation whose objective, as stated in its bylaws, is to pursue such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations. The bylaws establish several classes of membership, including individual regular and associate members and local chapters. Regular membership is limited to young men between the ages of 18 and 35, while associate membership is available to persons ineligible for regular membership, principally women and older men. An associate member may not vote or hold local or national office. Two local chapters in Minnesota have been violating the bylaws for several years by admitting women as regular members, and, as a result, have had a number of sanctions imposed on them by appellee, including denying their members eligibility for state or national office. When these chapters were notified by appellee that revocation of their charters was to be considered, members of both chapters filed discrimination charges with the Minnesota Department of Human Rights, alleging that the exclusion of women from full membership violated the Minnesota Human Rights Act (Act), which makes it "an unfair discriminatory practice . . . [t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." Before a hearing took place on the state charges, appellee brought suit against appellant state officials to prevent enforcement of the Act, alleging that, by requiring appellee to accept women as regular members, application of the Act would violate the male members' constitutional rights of free speech and association. Ultimately, a state hearing officer decided against appellee, and the District Court certified to the Minnesota Supreme Court the question whether appellee is "a place of public accommodation" within the meaning of the Act. That court answered the question in the affirmative, and, in the course of its holding, suggested that, unlike appellee, the Kiwanis Club might be sufficiently "private" to be outside the Act's scope. Appellee then amended its federal complaint to claim that the

Minnesota Supreme Court's interpretation of the Act rendered it unconstitutionally vague and overbroad. After trial, the District Court entered judgment in appellants' favor. The Court of Appeals reversed, holding that application of the Act to appellee's membership policies would produce a "direct and substantial" interference with appellee's freedom of association guaranteed by the First Amendment, and, in the alternative, that the Act was vague as construed and applied and hence unconstitutional under the Due Process Clause of the Fourteenth Amendment.

*Held:*

1. Application of the Act to appellee to compel it to accept women as regular members does not abridge either the male members' freedom of intimate association or their freedom of expressive association. Pp. 617–629.

(a) Several features of appellee's organization place it outside the category of highly personal relationships entitled to constitutional protection against unjustified interference by the State. Local chapters are neither small nor selective, no criteria being employed for judging applicants for membership. Moreover, many of the activities central to the formation and maintenance of the association of members with one another involve the participation of strangers to that relationship, numerous nonmembers of both genders regularly participating in a substantial portion of the activities. Accordingly, local chapters lack the distinctive characteristics that might afford constitutional protection to their members' decision to exclude women. Pp. 618–622.

(b) Minnesota's compelling interest in eradicating discrimination against its female citizens, an interest unrelated to the suppression of expression, justifies the impact that application of the Act to appellee may have on its male members' freedom of expressive association. By prohibiting gender discrimination in places of public accommodation, the Act protects the State's citizenry from a number of serious social and personal harms. Assuring women equal access to the goods, privileges, and advantages of a place of public accommodation clearly furthers compelling state interests. In applying the Act to appellee, the State has advanced those interests through the least restrictive means of achieving its ends. There is no basis in the record for concluding that admission of women as full voting members will impede appellee's ability to engage in its constitutionally protected civic, charitable, lobbying, fundraising, and other activities or to disseminate its preferred views. In any event, even if enforcement of the Act causes some incidental abridgment of appellee's protected speech, that effect is not greater than necessary to accomplish the State's legitimate purposes. Pp. 622–629.

2. The Act is not unconstitutionally vague and overbroad. The due process concerns of the void-for-vagueness doctrine are not seriously implicated by the Act, either on its face or as construed in this case. The Minnesota Supreme Court's construction of the Act by use of objective criteria typically employed in determining the applicability of antidiscrimination statutes to the membership policies of assertedly private clubs, ensures that the Act's reach is readily ascertainable. The contrast that court drew between appellee and the Kiwanis Club also disposes of appellee's contention that the Act is unconstitutionally overbroad. That court's articulated willingness to adopt limiting constructions that would exclude private groups from the Act's reach, together with the commonly used and sufficiently precise standards it employed to determine that appellee is not such a group, establishes that the Act, as construed, does not create an unacceptable risk of application to a substantial amount of protected conduct. Pp. 629–631.

709 F. 2d 1560, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Parts I and III of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 631. REHNQUIST, J., concurred in the judgment. BURGER, C. J., and BLACKMUN, J., took no part in the decision of the case.

*Richard L. Varco, Jr.*, Special Assistant Attorney General of Minnesota, argued the cause for appellants. With him on the briefs were *Hubert H. Humphrey III*, Attorney General, *Kent G. Harbison*, Chief Deputy Attorney General, *Thomas R. Muck*, Deputy Attorney General, and *Richard S. Slowes*, Assistant Attorney General.

*Carl D. Hall, Jr.*, argued the cause for appellee. With him on the brief was *Clay R. Moore*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Lawrence S. Kahn*, *Rosemarie Rhodes*, *Shelley B. Mayer* and *Kim E. Greene*, Assistant Attorneys General, *John K. Van De Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, and *Marian M. Johnston*, Deputy Attorney General; for the Alliance for Women Membership by *Danielle E. deBenedictis;* for the American Civil Liberties Union et al. by *Laurence H. Tribe*, *Burt Neuborne*, *Isabelle Katz*

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization. In the decision under review, the Court of Appeals for the Eighth Circuit concluded that, by requiring the United States Jaycees to admit women as full voting members, the Minnesota Human Rights Act violates the First and Fourteenth Amendment rights of the organization's members. We noted probable jurisdiction, *Gomez-Bethke* v. *United States Jaycees*, 464 U. S. 1037 (1984), and now reverse.

## I

### A

The United States Jaycees (Jaycees), founded in 1920 as the Junior Chamber of Commerce, is a nonprofit membership corporation, incorporated in Missouri with national headquarters in Tulsa, Okla. The objective of the Jaycees, as set out in its bylaws, is to pursue

> "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic inter-

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*Pinzler, E. Richard Larson,* and *Charles S. Sims;* for Community Business Leaders by *Eldon J. Spencer, Jr.;* for the NAACP Legal Defense and Educational Fund, Inc., by *Jack Greenberg, Beth J. Lief,* and *Judith Reed;* for the National League of Cities et al. by *Lawrence R. Velvel* and *Elaine D. Kaplan;* for the National Organization for Women et al. by *Judith I. Avner* and *Charlotte M. Fischman;* and for Women's Issues Network, Inc., by *Neil H. Cogan.*

Briefs of *amici curiae* urging affirmance were filed for the Boy Scouts of America by *Philip A. Lacovara, Malcolm E. Wheeler, George A. Davidson,* and *David K. Park;* for the Conference of Private Organizations by *Leonard J. Henzke, Jr.;* and for Rotary International by *William P. Sutter* and *Wm. John Kennedy.*

> est, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations." Quoted in Brief for Appellee 2.

The organization's bylaws establish seven classes of membership, including individual or regular members, associate individual members, and local chapters. Regular membership is limited to young men between the ages of 18 and 35, while associate membership is available to individuals or groups ineligible for regular membership, principally women and older men. An associate member, whose dues are somewhat lower than those charged regular members, may not vote, hold local or national office, or participate in certain leadership training and awards programs. The bylaws define a local chapter as "[a]ny young men's organization of good repute existing in any community within the United States, organized for purposes similar to and consistent with those" of the national organization. App. to Juris. Statement A98. The ultimate policymaking authority of the Jaycees rests with an annual national convention, consisting of delegates from each local chapter, with a national president and board of directors. At the time of trial in August 1981, the Jaycees had approximately 295,000 members in 7,400 local chapters affiliated with 51 state organizations. There were at that time about 11,915 associate members. The national organization's executive vice president estimated at trial that women associate members make up about two percent of the Jaycees' total membership. Tr. 56.

New members are recruited to the Jaycees through the local chapters, although the state and national organizations are also actively involved in recruitment through a variety of promotional activities. A new regular member pays an initial fee followed by annual dues; in exchange, he is entitled to participate in all of the activities of the local, state, and national organizations. The national headquarters employs a staff to develop "program kits" for use by local chapters that are designed to enhance individual development, community development, and members' management skills. These materials include courses in public speaking and personal finances as well as community programs related to charity, sports, and public health. The national office also makes available to members a range of personal products, including travel accessories, casual wear, pins, awards, and other gifts. The programs, products, and other activities of the organization are all regularly featured in publications made available to the membership, including a magazine entitled "Future."

## B

In 1974 and 1975, respectively, the Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members. Currently, the memberships and boards of directors of both chapters include a substantial proportion of women. As a result, the two chapters have been in violation of the national organization's bylaws for about 10 years. The national organization has imposed a number of sanctions on the Minneapolis and St. Paul chapters for violating the bylaws, including denying their members eligibility for state or national office or awards programs, and refusing to count their membership in computing votes at national conventions.

In December 1978, the president of the national organization advised both chapters that a motion to revoke their charters would be considered at a forthcoming meeting of the national board of directors in Tulsa. Shortly after receiving this notification, members of both chapters filed charges of discrimination with the Minnesota Department of Human Rights. The complaints alleged that the exclusion of women from full membership required by the national organization's bylaws violated the Minnesota Human Rights Act (Act), which provides in part:

> "It is an unfair discriminatory practice:
>
> "To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." Minn. Stat. § 363.03, subd. 3 (1982).

The term "place of public accommodation" is defined in the Act as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." § 363.01, subd. 18.

After an investigation, the Commissioner of the Minnesota Department of Human Rights found probable cause to believe that the sanctions imposed on the local chapters by the national organization violated the statute and ordered that an evidentiary hearing be held before a state hearing examiner. Before that hearing took place, however, the national organization brought suit against various state officials, appellants here, in the United States District Court for the District of Minnesota, seeking declaratory and injunctive relief to prevent enforcement of the Act. The complaint alleged that, by requiring the organization to accept women as regular members, application of the Act would violate the male members' constitutional rights of free speech and association. With the agreement of the parties, the District Court dismissed the suit without prejudice, stating that it could be renewed in the event the state administrative proceeding resulted in a ruling adverse to the Jaycees.

The proceeding before the Minnesota Human Rights Department hearing examiner then went forward and, upon its completion, the examiner filed findings of fact and conclusions of law. The examiner concluded that the Jaycees organization is a "place of public accommodation" within the Act and that it had engaged in an unfair discriminatory practice by excluding women from regular membership. He ordered the national organization to cease and desist from discriminating against any member or applicant for membership on the basis of sex and from imposing sanctions on any Minnesota affiliate for admitting women. *Minnesota* v. *United States Jaycees*, No. HR–79–014–GB (Minn. Office of Hearing Examiners for the Dept. of Human Rights, Oct. 9, 1979) (hereinafter Report), App. to Juris. Statement A107–A109. The Jaycees then filed a renewed complaint in the District Court, which in turn certified to the Minnesota Supreme Court the question whether the Jaycees organization is a "place of public accommodation" within the meaning of the State's Human Rights Act. See App. 32.

With the record of the administrative hearing before it, the Minnesota Supreme Court answered that question in the affirmative. *United States Jaycees* v. *McClure*, 305 N. W. 2d 764 (1981). Based on the Act's legislative history, the court determined that the statute is applicable to any "public business facility." *Id.*, at 768. It then concluded that the Jaycees organization (a) is a "business" in that it sells goods and extends privileges in exchange for annual membership dues; (b) is a "public" business in that it solicits and recruits dues-paying members based on unselective criteria; and (c) is a public business "facility" in that it conducts its activities at fixed and mobile sites within the State of Minnesota. *Id.*, at 768–774.

Subsequently, the Jaycees amended its complaint in the District Court to add a claim that the Minnesota Supreme Court's interpretation of the Act rendered it unconstitutionally vague and overbroad. The federal suit then proceeded to trial, after which the District Court entered judgment in favor of the state officials. *United States Jaycees* v. *McClure*, 534 F. Supp. 766 (1982). On appeal, a divided Court of Appeals for the Eighth Circuit reversed. *United States Jaycees* v. *McClure*, 709 F. 2d 1560 (1983). The Court of Appeals determined that, because "the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what [the Jaycees] does," the organization's right to select its members is protected by the freedom of association guaranteed by the First Amendment. *Id.*, at 1570. It further decided that application of the Minnesota statute to the Jaycees' membership policies would produce a "direct and substantial" interference with that freedom, *id.*, at 1572, because it would necessarily result in "some change in the Jaycees' philosophical cast," *id.*, at 1571, and would attach penal sanctions to those responsible for maintaining the policy, *id.*, at 1572. The court concluded that the State's interest in eradicating discrimination is not sufficiently compelling to outweigh this interference with the Jaycees' constitutional rights, because the organization is not wholly "public," *id.*, at 1571–1572, 1573, the state interest had been asserted selectively, *id.*, at 1573, and the antidiscrimination policy could be served in a number of ways less intrusive of First Amendment freedoms, *id.*, at 1573–1574.

Finally, the court held, in the alternative, that the Minnesota statute is vague as construed and applied and therefore unconstitutional under the Due Process Clause of the Fourteenth Amendment. In support of this conclusion, the court relied on a statement in the opinion of the Minnesota Supreme Court suggesting that, unlike the Jaycees, the Kiwanis Club is "private" and therefore not subject to the Act. By failing to provide any criteria that distinguish such "private" organizations from the "public accommodations" covered by the statute, the Court of Appeals reasoned, the Minnesota Supreme Court's interpretation rendered the Act unconstitutionally vague. *Id.*, at 1576–1578.

## II

Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

The intrinsic and instrumental features of constitutionally protected association may, of course, coincide. In particular, when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated. The Jaycees contend that this is such a case. Still, the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case. We therefore find it useful to consider separately the effect of applying the Minnesota statute to the Jaycees on what could be called its members' freedom of intimate association and their freedom of expressive association.

## A

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E. g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. See, *e. g.*, *Zablocki* v. *Redhail*, 434 U. S. 374, 383–386 (1978); *Moore* v. *East Cleveland*, 431 U. S. 494, 503–504 (1977) (plurality opinion); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 482–485 (1965); *Pierce* v. *Society of Sisters*, *supra*, at 535. See also *Gilmore* v. *City of Montgomery*, 417 U. S. 556, 575 (1974); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460–462 (1958); *Poe* v. *Ullman*, 367 U. S. 497, 542–545 (1961) (Harlan, J., dissenting). Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. See, *e. g.*, *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 844 (1977); *Carey* v. *Population Services International*, 431 U. S. 678, 684–686 (1977); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972); *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage, *e. g.*, *Zablocki* v. *Redhail*, *supra;* childbirth, *e. g.*, *Carey* v. *Population Services International*, *supra;* the raising and education of children, *e. g.*, *Smith* v. *Organization of Foster Families*, *supra;* and cohabitation with one's relatives, *e. g.*, *Moore* v. *East Cleveland*, *supra*. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees. Compare *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), with *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93–94 (1945).

Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. See generally *Runyon* v. *McCrary*, 427 U. S. 160, 187–189 (1976) (POWELL, J., concurring). We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent. In this case, however, several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection.

The undisputed facts reveal that the local chapters of the Jaycees are large and basically unselective groups. At the time of the state administrative hearing, the Minneapolis chapter had approximately 430 members, while the St. Paul chapter had about 400. Report, App. to Juris. Statement A–99, A–100. Apart from age and sex, neither the national organization nor the local chapters employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds. See 1 Tr. of State Administrative Hearing 124–132, 135–136, 174–176. In fact, a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex. *Id.*, at 135. Cf. *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.*, 410 U. S. 431, 438 (1973) (organization whose only selection criterion is race has "no plan or purpose of exclusiveness" that might make it a private club exempt from federal civil rights statute); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 236 (1969) (same); *Daniel* v. *Paul*, 395 U. S. 298, 302 (1969) (same). Furthermore, despite their inability to vote, hold office, or receive certain awards, women affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions. See Tr. 58. Indeed, numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings. See, *e. g.*, 305 N. W. 2d, at 772; Report, App. to Juris. Statement A102, A103.

In short, the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship. Accordingly, we conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women. We turn therefore to consider the extent to which application of the Minnesota statute to compel the Jaycees to accept women infringes the group's freedom of expressive association.

### B

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. See, *e. g.*, *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 294 (1981). According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. See, *e. g. Gilmore* v. *City of Montgomery*, 417 U. S., at 575; *Griswold* v. *Connecticut*, 381 U. S., at 482–485; *NAACP* v. *Button*, 371 U. S. 415, 431 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 462. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. See, *e. g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 907–909, 932–933 (1982); *Larson* v. *Valente*, 456 U. S. 228, 244–246 (1982); *In re Primus*, 436 U. S. 412, 426 (1978); *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231 (1977). In view of the various protected activities in which the Jaycees engages, see *infra*, at 626–627, that right is plainly implicated in this case.

Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, *e. g.*, *Healy* v. *James*, 408 U. S. 169, 180–184 (1972); it may attempt to require disclosure of the fact of membership in a group seeking anonymity, *e. g., Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U. S. 87, 91–92 (1982); and it may try to interfere with the internal organization or affairs of the group, *e. g., Cousins* v. *Wigoda*, 419 U. S. 477, 487–488 (1975). By requiring the Jaycees to admit women as full voting members, the Minnesota Act works an infringement of the last type. There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate. See *Abood* v. *Detroit Board of Education, supra*, at 234–235.

The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *E. g., Brown* v. *Socialist Workers '74 Campaign Committee, supra*, at 91–92; *Democratic Party of United States* v. *Wisconsin*, 450 U. S. 107, 124 (1981); *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) *(per curiam)*; *Cousins* v. *Wigoda, supra*, at 489; *American Party of Texas* v. *White*, 415 U. S. 767, 780–781 (1974); *NAACP* v. *Button, supra*, at 438; *Shelton* v. *Tucker*, 364 U. S. 479, 486, 488 (1960). We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.

On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria. See also *infra*, at 629–631. Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views. Instead, as the Minnesota Supreme Court explained, the Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. See 305 N. W. 2d, at 766–768. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.

The Minnesota Human Rights Act at issue here is an example of public accommodations laws that were adopted by some States beginning a decade before enactment of their federal counterpart, the Civil Rights Act of 1875, ch. 114, 18 Stat. 335. See Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws, 7 N. Y. U. Rev. L. & Soc. Change 215, 238 (1978) (hereinafter NYU Survey). Indeed, when this Court invalidated that federal statute in the *Civil Rights Cases*, 109 U. S. 3 (1883), it emphasized the fact that state laws imposed a variety of equal access obligations on public accommodations. *Id.*, at 19, 25. In response to that decision, many more States, including Minnesota, adopted statutes prohibiting racial discrimination in public accommodations. These laws provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957. See NYU Survey 239; Brief for State of New York et al. as *Amici Curiae* 1. Like many other States, Minnesota has progressively broadened the scope of its public accommodations law in the years since it was first enacted, both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden. See 305 N. W. 2d, at 766–768. In 1973, the Minnesota Legislature added discrimination on the basis of sex to the types of conduct prohibited by the statute. Act of May 24, 1973, ch. 729, § 3, 1973 Minn. Laws 2164.

By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms. In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life. See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728, 744–745 (1984); *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–726 (1982); *Frontiero* v. *Richardson*, 411 U. S. 677, 684–687 (1973) (plurality opinion). These concerns are strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services. Thus, in upholding Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a, which forbids race discrimination in public accommodations, we emphasized that its "fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 250 (1964). That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.

Nor is the state interest in assuring equal access limited to the provision of purely tangible goods and services. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 609 (1982). A State enjoys broad authority to create rights of public access on behalf of its citizens. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 81–88 (1980). Like many States and municipalities, Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct.

See 305 N. W. 2d, at 768; Brief for National League of Cities et al. as *Amici Curiae* 15–16. This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. See *Califano* v. *Webster*, 430 U. S. 313, 317 (1977) *(per curiam)*; *Frontiero* v. *Richardson*, *supra*, at 684–686. Thus, in explaining its conclusion that the Jaycees local chapters are "place[s] of public accommodations" within the meaning of the Act, the Minnesota court noted the various commercial programs and benefits offered to members and stated that "[l]eadership skills are 'goods,' [and] business contacts and employment promotions are 'privileges' and 'advantages' . . . ." 305 N. W. 2d, at 772. Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.

In applying the Act to the Jaycees, the State has advanced those interests through the least restrictive means of achieving its ends. Indeed, the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association. See *Hishon* v. *King & Spalding*, 467 U. S. 69, 78 (1984) (law firm "has not shown how its ability to fulfill [protected] function[s] would be inhibited by a requirement that it consider [a woman lawyer] for partnership on her merits"); *id.*, at 81 (POWELL, J., concurring); see also *Buckley* v. *Valeo*, 424 U. S., at 71–74; *American Party of Texas* v. *White*, 415 U. S., at 790. To be sure, as the Court of Appeals noted, a "not insubstantial part" of the Jaycees' activities constitutes protected expression on political, economic, cultural, and social affairs. 709 F. 2d, at 1570. Over the years, the national and local levels of the organization have taken public positions on a number of diverse issues, see *id.*, at 1569–1570; Brief for Appellee 4–5, and members of the Jaycees regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment, *ibid.*, see, *e. g.*, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980). There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members. Cf. *Democratic Party of United States* v. *Wisconsin*, 450 U. S., at 122 (recognizing the right of political parties to "protect themselves 'from intrusion by those with adverse political principles'"). Moreover, the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best. Cf. *Spence* v. *Washington*, 418 U. S. 405 (1974); *Griswold* v. *Connecticut*, 381 U. S., at 483.

While acknowledging that "the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex," 709 F. 2d, at 1571, the Court of Appeals nonetheless entertained the hypothesis that women members might have a different view or agenda with respect to these matters so that, if they are allowed to vote, "some change in the Jaycees' philosophical cast can reasonably be expected," *ibid.* It is similarly arguable that, insofar as the Jaycees is organized to promote the views of young men whatever those views happen to be, admission of women as voting members will change the message communicated by the group's speech because of the gender-based assumptions of the audience. Neither supposition, however, is supported by the record. In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, see *id.*, at 1570, or that the organization's public positions would have a different effect if the group were not "a purely young men's association," the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women. See Brief for Appellee 20–22, and n. 3. Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions. See, *e. g.*, *Palmore* v. *Sidoti*, 466 U. S. 429, 433–434 (1984); *Heckler* v. *Mathews*, 465 U. S., at 745. In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech. Compare *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 151–152 (1980), with *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975).

In any event, even if enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes. As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection. *Runyon* v. *McCrary*, 427 U. S., at 175–176. Compare *NAACP* v. *Claiborne Hardware Co.*, 458 U. S., at 907–909 (peaceful picketing), with *id.*, at 916 (violence). In prohibiting such practices, the Minnesota Act therefore "responds precisely to the substantive problem which legitimately concerns" the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose. See *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 810 (1984).

## III

We turn finally to appellee's contentions that the Minnesota Act, as interpreted by the State's highest court, is unconstitutionally vague and overbroad. The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Constuction Co.*, 269 U. S. 385, 391 (1926). The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review. See, *e. g., Kolender* v. *Lawson,* 461 U. S. 352, 357–358 (1983); *Grayned* v. *City of Rockford,* 408 U. S. 104, 108–109 (1972); *Giaccio* v. *Pennsylvania,* 382 U. S. 399, 402–404 (1966).

We have little trouble concluding that these concerns are not seriously implicated by the Minnesota Act, either on its face or as construed in this case. In deciding that the Act reaches the Jaycees, the Minnesota Supreme Court used a number of specific and objective criteria—regarding the organization's size, selectivity, commercial nature, and use of public facilities—typically employed in determining the applicability of state and federal antidiscrimination statutes to the membership policies of assertedly private clubs. See, *e. g., Nesmith* v. *Young Men's Christian Assn.*, 397 F. 2d 96

(CA4 1968); *National Organization for Women* v. *Little League Baseball, Inc.*, 127 N. J. Super. 522, 318 A. 2d 33, aff'd mem., 67 N. J. 320, 338 A. 2d 198 (1974). See generally NYU Survey 223–224, 250–252. The Court of Appeals seemingly acknowledged that the Minnesota court's construction of the Act by use of these familiar standards ensures that the reach of the statute is readily ascertainable. It nevertheless concluded that the Minnesota court introduced a constitutionally fatal element of uncertainty into the statute by suggesting that the Kiwanis Club might be sufficiently "private" to be outside the scope of the Act. See 709 F. 2d, at 1577. Like the dissenting judge in the Court of Appeals, however, we read the illustrative reference to the Kiwanis Club, which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria, as simply providing a further refinement of the standards used to determine whether an organization is "public" or "private." See *id.*, at 1582 (Lay, C. J., dissenting). By offering this counter-example, the Minnesota Supreme Court's opinion provided the statute with more, rather than less, definite content.

The contrast between the Jaycees and the Kiwanis Club drawn by the Minnesota court also disposes of appellee's contention that the Act is unconstitutionally overbroad. The Jaycees argues that the statute is "susceptible of sweeping and improper application," *NAACP* v. *Button*, 371 U. S., at 433, because it could be used to restrict the membership decisions of wholly private groups organized for a wide variety of political, religious, cultural, or social purposes. Without considering the extent to which such groups may be entitled to constitutional protection from the operation of the Minnesota Act, we need only note that the Minnesota Supreme Court expressly rejected the contention that the Jaycees should "be viewed analogously to private organizations such as the Kiwanis International Organization." 305 N. W. 2d, at 771. The state court's articulated willingness to adopt limiting constructions that would exclude private groups from the statute's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct. Cf. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 216–217 (1975); *NAACP* v. *Button*, *supra*, at 434. See *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982).

## IV

The judgment of the Court of Appeals is

*Reversed.*

JUSTICE REHNQUIST concurs in the judgment.

THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the decision of this case.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion, which set out the facts and reject the vagueness and overbreadth challenges to the Minnesota statute. With respect to Part II–A of the Court's opinion, I agree with the Court that the Jaycees cannot claim a right of association deriving from this Court's cases concerning "marriage, procreation, contraception, family relationships, and child rearing and education." *Paul* v. *Davis*, 424 U. S. 693, 713 (1976). Those cases, "while defying categorical description," *ibid.*, identify certain zones of privacy in which certain personal relationships or decisions are protected from government interference. Whatever the precise scope of the rights recognized in such cases, they do not encompass associational rights of a 295,000-member organization whose activities are not "private" in any meaningful sense of that term.

I part company with the Court over its First Amendment analysis in Part II–B of its opinion. I agree with the Court that application of the Minnesota law to the Jaycees does not contravene the First Amendment, but I reach that conclusion for reasons distinct from those offered by the Court. I believe the Court has adopted a test that unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society. At the same time, the Court has adopted an approach to the general problem presented by this case that accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment.

## I

The Court analyzes Minnesota's attempt to regulate the Jaycees' membership using a test that I find both overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns. The Court declares that the Jaycees' right of association depends on the organization's making a "substantial" showing that the admission of unwelcome members "will change the message communicated by the group's speech." See *ante*, at 626–628. I am not sure what showing the Court thinks would satisfy its requirement of proof of a membership-message connection, but whatever it means, the focus on such a connection is objectionable.

Imposing such a requirement, especially in the context of the balancing-of-interests test articulated by the Court, raises the possibility that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination. The Court's focus raises other problems as well. How are we to analyze the First Amendment associational claims of an organization that invokes its right, settled by the Court in

*NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460–466 (1958), to protect the privacy of its membership? And would the Court's analysis of this case be different if, for example, the Jaycees membership had a steady history of opposing public issues thought (by the Court) to be favored by women? It might seem easy to conclude, in the latter case, that the admission of women to the Jaycees' ranks would affect the content of the organization's message, but I do not believe that should change the outcome of this case. Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it.

The Court's readiness to inquire into the connection between membership and message reveals a more fundamental flaw in its analysis. The Court pursues this inquiry as part of its mechanical application of a "compelling interest" test, under which the Court weighs the interests of the State of Minnesota in ending gender discrimination against the Jaycees' First Amendment right of association. The Court entirely neglects to establish at the threshold that the Jaycees is an association whose activities or purposes should engage the strong protections that the First Amendment extends to expressive associations.

On the one hand, an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual. Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978); *Police Dept. of Chicago* v. *Mosley*, 408

U. S. 92, 96 (1972). A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion.

On the other hand, there is only minimal constitutional protection of the freedom of *commercial* association. There are, of course, some constitutional protections of commercial speech—speech intended and used to promote a commercial transaction with the speaker. But the State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.

The dichotomy between rights of commercial association and rights of expressive association is also found in the more limited constitutional protections accorded an association's recruitment and solicitation activities and other dealings with its members and the public. Reasonable, content-neutral state regulation of the time, place, and manner of an organization's relations with its members or with the State can pass constitutional muster, but only if the regulation is "narrowly drawn" to serve a "sufficiently strong, subordinating interest" "without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636–637 (1980); see *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 960–961 (1984). Thus, after careful scrutiny, we have upheld regulations on matters such as the financial dealings between an association and its members, see *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976), disclosure of membership lists to the State, see *NAACP* v. *Alabama*, *supra*, at 463; *Shelton* v. *Tucker*, 364 U. S. 479, 486 (1960), access to the ballot, time limits on registering before elections, and similar matters, see, *e. g.*, *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973); *Dunn*

v. *Blumstein*, 405 U. S. 330 (1972); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); *Williams* v. *Rhodes*, 393 U. S. 23 (1968). See also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981). By contrast, an organization engaged in commercial activity enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities. While the Court has acknowledged a First Amendment right to engage in nondeceptive commercial advertising, governmental regulation of the commercial recruitment of new members, stockholders, customers, or employees is valid if rationally related to the government's ends.

Many associations cannot readily be described as purely expressive or purely commercial. No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings. And innumerable commercial associations also engage in some incidental protected speech or advocacy. The standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First Amendment right to control its membership cannot, therefore, be articulated with simple precision. Clearly the standard must accept the reality that even the most expressive of associations is likely to touch, in some way or other, matters of commerce. The standard must nevertheless give substance to the ideal of complete protection for purely expressive association, even while it readily permits state regulation of commercial affairs.

In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.

Determining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive. It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression. Lawyering to advance social goals may be speech, *NAACP* v. *Button*, 371 U. S. 415, 429–430 (1963), but ordinary commercial law practice is not, see *Hishon* v. *King & Spalding*, 467 U. S. 69 (1984). A group boycott or refusal to deal for political purposes may be speech, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 912–915 (1982), though a similar boycott for purposes of maintaining a cartel is not. Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.*

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*See, *e. g.*, Girl Scouts of the U. S. A., You Make the Difference (1980); W. Hillcourt, The Official Boy Scout Handbook (1979); P. Fussell, The Boy Scout Handbook and Other Observations 7–8 (1982) ("*The Official Boy Scout Handbook*, for all its focus on Axmanship, Backpacking, Cooking, First Aid, Flowers, Hiking, Map and Compass, Semaphore, Trees, and Weather, is another book about goodness. No home, and certainly no government office, should be without a copy").

The considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are therefore fluid and somewhat uncertain. But the Court has recognized the need to draw similar lines in the past. Two examples, both addressed in cases decided this Term, stand out.

The first concerns claims of First Amendment protection made by lawyers. On the one hand, some lawyering activity is undoubtedly protected by the First Amendment. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In re Primus*, 436 U. S. 412, 426 (1978); see *NAACP* v. *Button, supra,* at 429–430. On the other hand, ordinary law practice for commercial ends has never been given special First Amendment protection. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 459 (1978). We emphasized this point only this Term in *Hishon* v. *King & Spalding*, *supra*, where we readily rejected a large commercial law firm's claim to First Amendment protection for alleged gender-based discriminatory partnership decisions for associates of the firm. We found no need to inquire into any connection between gender as a condition of partnership and the speech of the law firm, and we undertook no weighing of "compelling" state interests against the speech interests of the law firm. As a commercial enterprise, the law firm could claim no First Amendment immunity from employment discrimination laws, and that result would not have been altered by a showing that the firm engaged even in a substantial amount of activity entitled to First Amendment protection.

We have adopted a similar analysis in our cases concerning association with a labor union. A State is free to impose rational regulation of the membership of a labor union representing "the general *business* needs of employees." *Rail-*

*way Mail Assn.* v. *Corsi*, 326 U. S. 88, 94 (1945) (emphasis added). The State may not, on the other hand, compel association with a union engaged in ideological activities. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 236 (1977). The Court has thus ruled that a State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations. *Ibid.* We applied this distinction in *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984), decided this Term. Again, the constitutional inquiry is not qualified by any analysis of governmental interests and does not turn on an individual's ability to establish disagreement with the particular views promulgated by the union. It is enough if the individual simply expresses unwillingness to be associated with the union's ideological activities.

In summary, this Court's case law recognizes radically different constitutional protections for expressive and nonexpressive associations. The First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity, but no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association. The proper approach to analysis of First Amendment claims of associational freedom is, therefore, to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter.

## II

Minnesota's attempt to regulate the membership of the Jaycees chapters operating in that State presents a relatively easy case for application of the expressive-commercial dichotomy. Both the Minnesota Supreme Court and the United States District Court, which expressly adopted the state court's findings, made findings of fact concerning the commercial nature of the Jaycees' activities. The Court of Appeals, which disagreed with the District Court over the legal conclusions to be drawn from the facts, did not dispute any of those findings. *United States Jaycees* v. *McClure*, 709 F. 2d 1560 (CA8 1983). "The Jaycees is not a political party, or even primarily a political pressure group, but the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what it does. . . . [A] good deal of what the [Jaycees] does indisputably comes within the right of association . . . in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances." *Id.*, at 1570.

There is no reason to question the accuracy of this characterization. Notwithstanding its protected expressive activities, the Jaycees—otherwise known as the Junior Chamber of Commerce—is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management. The organization claims that the training it offers its members gives them an advantage in business, and business firms do indeed sometimes pay the dues of individual memberships for their employees. Jaycees members hone their solicitation and management skills, under the direction and supervision of the organization, primarily through their active recruitment of new members. "One of the major activities of the Jaycees is the sale of memberships in the organization. It encourages continuous recruitment of members with the expressed goal of increasing membership . . . . The Jaycees itself refers to its members as customers and membership as a product it is selling. More than 80 percent of the national officers' time is dedicated to recruitment, and more than half of the available achievement awards are in part conditioned on achievement in recruitment." *United States Jaycees* v. *McClure*, 534 F. Supp. 766, 769 (Minn. 1982). The organization encourages record-breaking performance in selling memberships: the current records are 348 for most memberships sold in a year by one person, 134 for most sold in a month, and 1,586 for most sold in a lifetime.

Recruitment and selling are commercial activities, even when conducted for training rather than for profit. The "not insubstantial" volume of protected Jaycees activity found by the Court of Appeals is simply not enough to preclude state regulation of the Jaycees' commercial activities. The State of Minnesota has a legitimate interest in ensuring nondiscriminatory access to the commercial opportunity presented by membership in the Jaycees. The members of the Jaycees may not claim constitutional immunity from Minnesota's antidiscrimination law by seeking to exercise their First Amendment rights through this commercial organization.

For these reasons, I agree with the Court that the Jaycees' First Amendment challenge to the application of Minnesota's public accommodations law is meritless. I therefore concur in Parts I and III of the Court's opinion and in the judgment.

# REGAN, SECRETARY OF THE TREASURY, ET AL. v. TIME, INC.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 82–729. Argued November 9, 1983—Decided July 3, 1984

Title 18 U. S. C. § 474 makes it a crime to photograph any obligation or other security of the United States. But 18 U. S. C. § 504(1) permits the printing or publishing of illustrations of any such obligation or other security "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," if the illustrations are in black and white and less than three-fourths or more than one and one-half the size of the original and if the negative and plates used in making the illustrations are destroyed after their final authorized use. Appellee magazine publisher, after being warned that it was violating §§ 474 and 504 by publishing a photographic color reproduction of United States currency on the cover of one of its magazines, brought an action in Federal District Court seeking a declaratory judgment that the statutes were unconstitutional on their face and as applied to appellee and an injunction preventing their enforcement. The District Court, ruling in appellee's favor, held that the statutes violated the First Amendment.

*Held:* The judgment is affirmed in part and reversed in part.

539 F. Supp. 1371, affirmed in part and reversed in part.

JUSTICE WHITE delivered the opinion of the Court with respect to Part II–A, concluding that § 504's purpose requirement is unconstitutional. It cannot be sustained as a valid time, place, and manner regulation because it discriminates on the basis of content in violation of the First Amendment. A determination as to the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under § 504, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message in one is newsworthy or educational but the message in the other is not. Pp. 648–649.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, delivered an opinion with respect to Parts II–B, II–C, and II–D, concluding that:

1. The issue of the validity of § 504's publication requirement on vagueness or overbreadth grounds cannot properly be addressed. There is no evidence that appellee has ever, or will ever, have difficulty

meeting that requirement, and therefore its validity is of only academic interest to appellee. And where it is not clear from the record that the requirement will be used to prevent a person from utilizing an otherwise legitimate photograph, appellee publisher cannot claim that the statute is overbroad because it unconstitutionally precludes nonpublishers from making reproductions of currency even though they meet the statute's other requirements. Pp. 649–652.

2. The fact that § 504's purpose requirement is unconstitutional does not automatically render the statute's entire regulatory scheme invalid. Whether an unconstitutional provision is severable from the remainder of a statute is largely a question of legislative intent, but the presumption is in favor of severability. Here, it appears that the policies Congress sought to advance by enacting § 504—to ease the administrative burden without hindering the Government's efforts to enforce the counterfeiting laws—can be effectuated even though the purpose requirement is unenforceable. Pp. 652–655.

3. Section 504's size and color requirements are valid as reasonable manner regulations that can constitutionally be imposed on those wishing to publish photographic reproductions of currency. Compliance with these requirements does not prevent appellee from expressing any view on any subject or from using illustrations of currency in expressing these views. Moreover, the Government does not need to evaluate the nature of the message imparted in order to enforce the requirements, since they restrict only the manner in which the illustrations can be presented. Such requirements also effectively serve the Government's compelling interest in preventing counterfeiting. Because the provisions of § 474 are of real concern only when § 504's requirements are not complied with, § 474 is also constitutional. Pp. 655–659.

JUSTICE STEVENS, concluding that § 504's purpose requirement is constitutional, also concluded that the statute's size and color requirements are permissible methods of minimizing the risk of fraud as well as counterfeiting, and can have only a minimal impact on appellee's ability to communicate effectively. Pp. 697–704.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part II–A, in which BURGER, C. J., and BRENNAN, MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II–B, II–C, and II–D, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 659. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 691. STE-

**VENS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 692.**

*Elliott Schulder* argued the cause for appellants. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller,* and *Richard A. Olderman.*

*Stuart W. Gold* argued the cause for appellee. With him on the brief was *Ellen S. Oran.*

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Part II–A, and an opinion with respect to Parts II–B, II–C, and II–D, in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

The Constitution expressly empowers Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U. S. Const., Art. I, §8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 U. S. C. §474, ¶6, and 18 U. S. C. §504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. Appellants ask us to overturn that judgment.

## I

Title 18 U. S. C. §474 was enacted during the Civil War to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time. See *United States* v. *Raynor*, 302 U. S. 540, 544–546 (1938). The sixth paragraph of that section provides criminal liability for anyone who "prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States] or any part thereof. . . ."[1]

This complete ban on the use of photographic reproductions of currency remained without statutory exception for almost a century. However, during that time, the Treasury Department developed a practice of granting special permission to those who wished to use certain illustrations of paper money for legitimate purposes. In 1958, Congress acted to codify that practice by amending[2] 18 U. S. C. § 504 so as to permit the "printing, publishing, or importation . . . of illustrations of . . . any . . . obligation or other security of the United States . . . for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums . . . ." 18 U. S. C. § 504 (1). In order to "prevent any possibility of the illustrations being used as an instrument of fraud," S. Rep. No. 2446, 85th Cong., 2d Sess., 5 (1958) (hereafter S. Rep. No. 2446); H. R. Rep. No. 1709, 85th Cong., 2d Sess., 3 (1958) (hereafter H. R. Rep. No. 1709), and in an effort to avoid creating conditions which would "facilitate counterfeiting," S. Rep. No. 2446, at 5–6; H. R. Rep. No. 1709, at 3, Congress also adopted three restrictions that the Treasury Department normally imposed on those who were granted special permission to create and use such photographs. First, the illustrations had to be in black and white. Second, they had to be undersized or oversized, *i. e.*, less than three-fourths or more than one and one-half the size of the original. And third, the negative and plates used in making the illustrations had to be destroyed after their final authorized use.[3] Therefore, under the present statutory scheme, a person may make photographic reproductions of currency without risking criminal liability if the reproductions meet the purpose (numismatic, philatelic, educational, historical, or newsworthy), publication (articles, books, journals, newspapers, or albums), color (black and white), and size (less than three-fourths or more than one and one-half of the size of the original) requirements of § 504(1), and if the negatives and plates are destroyed immediately after use.

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[1] Congress first made it a crime to "print, photograph, or in any other manner execute" an impression "in the likeness" of any United States security in 1862. Act of Feb. 25, 1862, ch. 33, §§ 6, 7, 12 Stat. 347–348. Two years later, Congress broadened the prohibition to include the making of any such print or photograph. Act of June 30, 1864, ch. 172, § 11, 13 Stat. 221–222. The statute was reenacted, with few changes, as § 5430 of the Revised Statutes of 1878, and again as § 150 of the codification of 1909. Act of Mar. 4, 1909, ch. 321, 35 Stat. 1116. The statute was reenacted once again with minor changes in the 1948 recodification of the penal laws. Ch. 645, 62 Stat. 706.

[2] Section 504 was originally enacted in 1923 to authorize certain illustrations of postage and revenue stamps. Act of Mar. 3, 1923, ch. 218, 42 Stat. 1437. The 1958 amendment was a wholesale revision of the statute.

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[3] In full, § 504(1) provides:

"Notwithstanding any other provision of this chapter, the following are permitted:

"(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

"(A) postage stamps of the United States,

"(B) revenue stamps of the United States,

"(C) any other obligation or other security of the United States, and

"(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

"(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

"(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

"(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section."

Over the course of the past two decades, Time, Inc., the publisher of several popular magazines, has been advised by Secret Service agents that particular photographic reproductions of currency appearing in its magazines violated the provisions of §§ 474 and 504. Despite the warnings, Time continued to use such reproductions. When the front cover of the February 16, 1981, issue of Sports Illustrated carried a photographic color reproduction of $100 bills pouring into a basketball hoop, a Secret Service agent informed Time's legal department that the illustration violated federal law and that it would be necessary for the Service to seize all plates and materials used in connection with the production of the cover. The agent also asked for the names and addresses of all the printers who prepared the cover and requested an interview with a member of Time's management. Ten days later, Time initiated the present action against the Secretary of the Treasury, the Director of the Secret Service, and others,[4] seeking a declaratory judgment that §§ 474, ¶ 6, and 504 were unconstitutional on their face and as applied to Time, as well as an injunction preventing the defendants from enforcing or threatening to enforce the statutes.

On cross-motions for summary judgment, the District Court ruled in favor of Time. 539 F. Supp. 1371 (SDNY 1982). The court first determined that Time's use of the illustrations was speech protected by the First Amendment. It then held that § 474 could not by itself pass constitutional muster because although it was enacted to protect the Government's compelling interest in preventing counterfeiting, it was overbroad.

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[4] In addition to the Secretary of the Treasury and the Director of the Secret Service, the defendants included the Attorney General, the United States Attorney for the Southern District of New York, and the Special Agent in charge of the Secret Service's New York Field Office.

The court concluded that the exceptions permitted by § 504 did not save the blanket prohibition because that section presented constitutional problems of its own. Focusing on the requirements that the illustration appear in an article, book, journal, newspaper, or album and that it be used for philatelic, numismatic, educational, historical, or newsworthy purposes, the court held that § 504 could not be sustained as a valid time, place, and manner regulation because it required the Government to make distinctions based on content or subject matter. The court also determined that the purpose and publication restrictions were unconstitutionally vague, observing that "[t]he determination of what is 'philatelic, numismatic, educational, historical, or newsworthy' is rife with assumption and open to varying interpretation" and that "[t]he definition of a journal, newspaper or album is anyone's game to play." 539 F. Supp., at 1390. The court thus concluded that both § 474, ¶ 6, and § 504 were unconstitutional.

Appellants sought review of the District Court's decision by invoking this Court's appellate jurisdiction under 28 U. S. C. § 1252. We noted probable jurisdiction, 459 U. S. 1198 (1983), in order to determine whether the two statutes could survive constitutional scrutiny.

## II

The District Court correctly observed that "[b]ecause of the interrelationship of Sections 474 and 504, the ultimate constitutional analysis must be directed to the impact of these sections in tandem." 539 F. Supp., at 1385. The exceptions outlined in § 504 apply "[n]otwithstanding any other provision of this chapter," including § 474. The criminal liability imposed by § 474 therefore applies only when a photographic reproduction fails to meet the requirements imposed by § 504. Thus, if the restrictions imposed by § 504 sufficiently accommodate Time's First Amendment interests, both statutes must be upheld. We accordingly begin our inquiry by focusing on the restrictions imposed by § 504.

## A

Appellants assert that the restrictions imposed by § 504 are valid as reasonable time, place, and manner regulations. In order to be constitutional, a time, place, and manner regulation must meet three requirements. First, it "'may not be based upon either the content or subject matter of speech.'" *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648 (1981) (quoting *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 536 (1980)). Second, it must "'serve a significant governmental interest.'" 452 U. S., at 649 (quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976)). And third, it must "'leave open ample alternative channels for communication of the information.'" 452 U. S., at 648 (quoting *Virginia Pharmacy Board*, *supra*, at 771). The District Court concluded that the purpose requirement of § 504 could not be sustained as a valid time, place, and manner regulation because it discriminates on the basis of content. We agree.

A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often "dependent solely on the nature of the message being conveyed." *Carey* v. *Brown*, 447 U. S. 455, 461 (1980). Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment. *Id.*, at 463; *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972). The purpose requirement of § 504 is therefore constitutionally infirm.[5]

## B

The District Court also concluded on vagueness and other grounds that limiting the exemption from the § 474 ban to likenesses of currency contained in "publications" was itself invalid. We do not address that issue, however, because there is no evidence or suggestion that Time, a publisher of magazines, has ever, or will ever, have any difficulty in meeting that requirement.[6] The validity of the publication requirement, standing alone, is therefore of only academic interest to Time. This Court, as a matter of both constitutional limitation and prudential restraint, does not sit to resolve issues that are of only passing concern to the parties.

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[5] Appellants do not defend the constitutionality of the purpose requirement as written. Brief for Appellants 27–28; Tr. of Oral Arg. 10–14. They ask us to construe the statute narrowly in order to avoid the constitutional conflict, contending that the references to the various purposes are merely descriptive and illustrative, rather than prescriptive and mandatory. However, appellants are unable to suggest any meaningful interpretation of the purpose requirement that would survive constitutional scrutiny. If the requirement means only that the photograph must serve some purpose, it is meaningless because every photograph serves some purpose. On the other hand, if the requirement means that the photograph must serve a purpose similar to those enumerated in the statute, it requires the type of content-based scrutiny that the First Amendment forbids. Assuming that Congress intended the language to have some meaning, we conclude that the entire purpose requirement is unconstitutional. In light of that ruling, there is no need for us to consider Time's argument that the purpose requirement is also unconstitutionally vague.

[6] JUSTICE BRENNAN seems to believe that we hold that the publication requirement can constitutionally be used to prohibit nonpublishers from ever using photographic reproductions of currency since much of the discussion in his opinion concerns the constitutionality of the publication requirement. *Post*, at 679–690. As clearly stated above, and as we reiterate here, we express no opinion as to the validity of the publication requirement since Time has failed to show that that requirement affects its conduct in any way. It may well be that a person could not constitutionally be prohibited from using a reproduction which conformed with every portion of the statute other than the publication requirement. But that is

Time nevertheless contends that the publication requirement renders the statute overbroad and subject to challenge by a publisher such as Time. *Kolender* v. *Lawson*, 461 U. S. 352, 358–359, n. 8 (1983); *New York* v. *Ferber*, 458 U. S. 747, 768–769 (1982); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612-616 (1973); *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940). The essence of Time's argument seems to be that even if publishers may constitutionally be required to conform to the other requirements of § 504, that section is overbroad because it unconstitutionally precludes nonpublishers from making reproductions of currency even though they meet the other requirements of the statute. However, such an overbreadth challenge can be raised on behalf of others only when the statute is substantially overbroad, *i. e.*, when the statute is unconstitutional in a substantial portion of the cases to which it applies. *New York* v. *Ferber*, *supra*, at 770; *Broadrick* v. *Oklahoma*, *supra*, at 615. How often the publication requirement will

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an issue which must be raised by someone who has been, or will be, precluded from using such a reproduction for that reason.

JUSTICE BRENNAN also suggests that we should decide whether the publication requirement is invalid on the basis that it is inextricably intertwined with the unconstitutional purpose requirement. However, Time has not made that argument. Time argues that the publication requirement is unconstitutional because it is vague and overbroad, not that it should be struck down because Congress would never have included the requirement in the statute in the absence of the purpose requirement. Given the fact that we hold that, even in the absence of both the purpose and publication requirements, the color and size requirements can constitutionally be applied to Time, *infra*, at 656, 658–659, and that Time has made no showing that the validity of the publication requirement by itself is of any interest to it, we see no need to reach out and decide the latter issue on our own.

be used to prevent a person from utilizing an otherwise legitimate photograph is not clear from the record before us. In describing the noncounterfeiting uses to which photographic reproductions of currency could be put, the House and Senate Committees referred only to situations in which publications were involved.[7] In light of the paucity of evidence to the contrary,[8] we may assume that the legitimate reach of

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[7] The Committees observed that photographic reproductions of currency could be used for many legitimate purposes. "Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example, in school textbooks. Collectors of old paper money likewise wish to use illustrations of such money in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money to picture the currency in circulation during a particular historical period. Newspapers quite often publish pictures of paper money or checks in connection with news articles . . . ." S. Rep. No. 2446, at 5; H. R. Rep. No. 1709, at 3.

[8] Time cites one instance in which a person may have been prevented from utilizing a photographic reproduction of currency because it failed to appear in one of the enumerated publications. *Wagner* v. *Simon*, 412 F. Supp. 426, 431, n. 6 (WD Mo. 1974), aff'd, 534 F. 2d 833 (CA8 1976). But one arguably unconstitutional application of the statute does not prove that it is substantially overbroad, particularly in light of the numerous instances in which the requirement will easily be met. See n. 7, *supra*.

JUSTICE BRENNAN maintains that we misconstrue the overbreadth doctrine by focusing on the one prior instance in which the statute was arguably applied in an unconstitutional manner. *Post*, at 684. However, we cite only the one example because that is the only concrete example brought to our attention by Time. There is no evidence that the Government has ever, or will ever, interpret the statute so as to prevent Polaroid snapshots of children holding currency or any of the other hypothetical activities conjured up in Time's brief. It is important to remember that the overbreadth doctrine operates as an exception to the normal rules of standing. Thus, it is up to the party invoking the doctrine to demonstrate "a *realistic* danger that the [ordinance] will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 801 (1984) (emphasis added). JUSTICE BRENNAN states that we should remand the case to provide Time with an opportunity to make that showing, suggesting that Time had no idea that such a showing would be required. *Post*, at 680, n. 18. This ignores the fact that it was Time, not this Court,

§ 504 "dwarfs its arguably impermissible applications" to nonpublishers. *New York* v. *Ferber*, *supra*, at 773. Therefore, invocation of the overbreadth doctrine is unavailing to Time.

### C

The District Court concluded that because the purpose and publication requirements were unconstitutional, the entire regulatory scheme outlined in § 504 was invalid. This was error. First, as noted in Part II–B, the validity of the publication requirement is not an issue that can properly be addressed in this case. More importantly, even if both requirements were unconstitutional, it does not automatically follow that the entire statute must fail.[9]

In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U. S. 87, 96

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which first argued that it had standing to challenge the publication requirement because of the overbreadth doctrine. See Brief for Appellee 41, n. 29 ("The Government . . . argues that Time has no standing to raise this issue . . . . This strategy . . . flies in the face of traditional First Amendment overbreadth analysis, under which Time is permitted to challenge § 504 on behalf of those to whom the statute would be unconstitutionally applied").

[9] JUSTICE BRENNAN seems to misconceive the premise upon which our argument is based as he goes to great lengths to establish that the publication requirement and the purpose requirement "are so completely intertwined as to be plainly inseverable . . . ." *Post*, at 677. See *post*, at 665–677. Our severability argument proceeds on the premise that both the purpose and publication requirements are unconstitutional. Thus, our entire discussion is directed at whether the color and size requirements can survive on their own.

(1909). Thus, this Court has upheld the constitutionality of some provisions of a statute even though other provisions of the same statute were unconstitutional. *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976); *United States* v. *Jackson*, 390 U. S. 570, 585–591 (1968); *El Paso & Northeastern R. Co.*, *supra*, at 96. See also *Griffin* v. *Breckenridge*, 403 U. S. 88, 104 (1971). For the same reasons, we have often refused to resolve the constitutionality of a particular provision of a statute when the constitutionality of a separate, controlling provision has been upheld. *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234–235 (1932); *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 120–121 (1910); *Field* v. *Clark*, 143 U. S. 649, 695–696 (1892). Before invalidating the entire statute, we should therefore determine whether the remaining provisions of § 504 can survive in the absence of the purpose requirement.

Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability. "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley* v. *Valeo*, *supra*, at 108 (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, *supra*, at 234). Accord, *United States* v. *Jackson*, *supra*, at 585. Utilizing this standard, we are quite sure that the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable.

One of the main purposes of the 1958 version of § 504 was to relieve the Treasury Department of the burden of processing numerous requests for special permission to use photographic reproductions of currency. The legislation was designed to "obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of . . . illustrations [of currency was] desired." S. Rep. No. 2446, at 6; H. R. Rep. No. 1709, at 4. At the same time, Congress was aware that in granting requests in the past, the Secretary had imposed size and color limitations in order "[t]o prevent any possibility of the illustrations being used as an instrument of fraud." S. Rep. No. 2446, at 5; H. R. Rep. No. 1709, at 3. Congress determined that the easiest way to ease the administrative burden without undermining the Government's efforts to prevent counterfeiting was to codify the then-existing practice, relying heavily on the Treasury Department's opinion that "the printing in publications of black-and-white illustrations of paper money . . . restricted in size will not facilitate counterfeiting." S. Rep. No. 2446, at 5–6; H. R. Rep. No. 1709, at 3. This congressional desire to ease the administrative burden without hindering the Government's efforts to enforce the counterfeiting laws can be achieved even if the purpose requirement is eliminated from the statute.[10] There is no indication that Congress believed

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[10] JUSTICE BRENNAN seems to agree that the purpose requirement does not significantly advance Congress' express interest in easing the Treasury Department's administrative burden. *Post*, at 676–677, n. 14. Similarly, he does not dispute our conclusion that the statute can serve the other purpose expressed by Congress—to ensure that the exception would not permit counterfeiters to circumvent the law—even in the absence of the purpose requirement. Instead, he argues that Congress had some other, paramount interest in mind when it enacted the statute and that that interest cannot be achieved once the purpose requirement is struck down. This overriding congressional interest, according to JUSTICE BRENNAN, is to "permit illustrations for purposes Congress considered worthwhile." *Post*, at 673. However, nothing in the legislative history of the 1958 amendment indicates that Congress' overriding concern in expanding the purpose requirement was to promote certain worthwhile activities. There is no discussion in the legislative history concerning which activities were considered to be most worthwhile or why some activities were more worthwhile than others. Instead, the statute referred to illustrations for numismatic, educational, historical, and newsworthy purposes only because those were the types of activities for which the Treasury Department had received exemption requests in the past.

"The Treasury Department receives numerous requests for special permission to use illustrations of paper money . . . for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United that the purpose requirement either significantly eased the Treasury Department's burden or was necessary to prevent the exception from being used as a means of circumventing the counterfeiting laws. Thus, if the size and color limitations are constitutional,[11] Congress' intent can in large measure be fulfilled without the purpose requirement. We therefore examine the size and color restrictions in light of the First Amendment interests asserted by Time.

## D

In considering the validity of the color and size limitations, we once again begin with appellants' contention that the requirements are sustainable as reasonable time, place, and manner regulations. Unlike the purpose requirement, the

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States savings bonds and postal money orders, for example in school textbooks. Collectors of old paper money likewise wish to use illustrations in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money to picture the currency in circulation during a particular historical period. Newspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations.

. . . . .

"Paragraph (1) of section 504 . . . as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes *and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired.*" S. Rep. No. 2446, at 5–6; H. R. Rep. No. 1709, at 3–4 (emphasis added).

While the legislation undoubtedly benefits those who engage in the listed activities, there is no indication that Congress enacted the legislation out of special concern for such individuals. Instead, as Time itself points out, Congress apparently acted "in response to the Treasury Department's desire to be rid of an administrative nuisance." Brief for Appellee 8. As noted above, that interest and the other interest expressed by Congress when it enacted the amendment can adequately be served even in the absence of the purpose requirement.

[11] Time does not challenge the constitutionality of the requirement that the negatives and plates be destroyed immediately after the final authorized use. *Id.*, at 9, n. 11.

size and color limitations do not discriminate on the basis of content. Compliance with the color and size requirements does not prevent Time from expressing any view on any subject or from using illustrations of currency in expressing those views. More importantly, the Government does not need to evaluate the nature of the message being imparted in order to enforce the color and size limitations. Those limitations restrict only the manner in which the illustrations can be presented. They are thus similar to the decibel level restrictions upheld by this Court in *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), and the size and height limitations on outdoor signs upheld by other courts, *Baldwin* v. *Redwood City*, 540 F. 2d 1360, 1368–1369 (CA9 1976), cert. denied *sub nom. Leipzig* v. *Baldwin*, 431 U. S. 913 (1977); *Temple Baptist Church, Inc.* v. *City of Albuquerque*, 98 N. M. 138, 146, 646 P. 2d 565, 573 (1982); *Krych* v. *Village of Burr Ridge*, 111 Ill. App. 3d 461, 464–466, 444 N. E. 2d 229, 232–233 (1982). Therefore, the size and color limitations pass the first of the three requirements of a valid time, place, and manner regulation.

The size and color limitations also meet the second requirement in that they effectively serve the Government's concededly compelling interest in preventing counterfeiting. Time contends that although the color restriction serves the Government's interest in preventing counterfeiting, it is nonetheless invalid because it is not narrow enough. Time asserts that the color restriction applies to an illustration of currency regardless of its capacity to deceive and is thus broader than is necessary to achieve the Government's interest in preventing counterfeiting. However, Time places too narrow a construction on the Government's interest and too heavy a burden on those enacting time, place, and manner regulations. The Government's interest in preventing the color photographic reproduction of currency is not limited to its desire to prevent would-be counterfeiters from utilizing the illustration itself. The requirement that the illustration be in black and white is also designed to make it harder for counterfeiters to gain access to negatives that could easily be altered and used for counterfeiting purposes. Only one negative and plate is required for black-and-white printing. On the other hand, the color-printing process requires multiple negatives and plates. This increases a counterfeiter's access to the negatives and plates and enables him to more easily use them for counterfeiting purposes under the guise of a legitimate project. In opposing a recent bill designed to eliminate the color restriction, a Treasury Department official noted these concerns, stating that "[t]he size restriction alone does not address the problem of widespread possession of color separation negatives, nor does it impact upon the availability of a ready-made alibi for the possessors." Statement of the Honorable Robert E. Powis, Deputy Assistant Secretary of the Treasury, before the Subcommittee on Criminal Justice, House Judiciary Committee on H. R. 4275, reprinted in App. D to Juris. Statement 43a. It is therefore sufficiently evident that the color limitation serves the Government's interest in a substantial way. That the limitations may apply to some photographs that are themselves of no use to counterfeiters does not invalidate the legislation. The less-restrictive-alternative analysis invoked by Time has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the color restriction substantially serves the Government's legitimate ends.[12]

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[12] JUSTICE BRENNAN argues that the color restriction at issue in this case is invalid because one of the interests served by that restriction—prohibiting counterfeiters from gaining access to color negatives and plates and from having an instant alibi for possessing those items—was not adequately expressed in the 1958 legislative history. *Post*, at 688–690, n. 27. Although Congress never expressly articulated this specific interest when it enacted the legislation in 1958, it did state that in imposing the size and color restrictions, it was relying heavily on the Treasury Department's opinion that the restrictions would adequately ensure that the statutory exception would not "facilitate counterfeiting." S. Rep. No. 2446, at 5–6;

The propriety of the size limitation is even clearer. The size limitation is a reasonable and sufficiently precise way of ensuring that the illustrations themselves do not have the capacity to deceive the unwary and inattentive. Indeed, Time does not advance any serious challenge to the legitimacy of that requirement.

The color and size limitations are therefore reasonable manner regulations[13] that can constitutionally be imposed on

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H. R. Rep. No. 1709, at 3. JUSTICE BRENNAN does not dispute that this interest is furthered by the color requirement's effect of limiting the availability of negatives and plates to would-be counterfeiters. Instead, he argues that the particular negatives and plates used by Time would be of little assistance to counterfeiters and that the asserted interest is adequately served by other provisions of the statute. *Post*, at 688–690, n. 27. Neither of these arguments is persuasive.

First, in determining whether a time, place, and manner regulation substantially serves the Government's interest, the effectiveness of the regulation should not be measured solely by the adverse consequences of exempting a particular plaintiff from the regulation. *Clark* v. *Community for Creative Non-Violence*, *ante*, at 296–297; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 652–653 (1981). If Time is exempted from the color requirement, so must all others who wish to use such reproductions. While Time may consistently use negatives and plates that are of little use to counterfeiters, there is no way of ensuring that others will adhere to that practice.

Second, the fact that the Government's interest is served to some degree by the requirement that the negatives and plates be destroyed after their final use does not render the color requirement superfluous. During the time that the negatives and plates are in existence for legitimate purposes, they can still be used for counterfeiting purposes, possibly by the same individuals who are creating the legitimate reproductions. Coupled with the other interest served by the color requirement—to prevent the unwary from being deceived by otherwise legitimate reproductions—we believe that the Government's interest in the increased deterence provided by the color requirement in this respect is sufficient to override whatever interest Time might have in printing the reproduction in color.

[13] Time does not suggest that the color and size restrictions are invalid because they fail to leave open ample alternative channels of communication. Nor would such an argument be persuasive. Time is free to use whatever means it wishes to communicate its ideas short of using color

those wishing to publish photographic reproductions of currency. Because the provisions of § 474 are of real concern only when the limitations of § 504 are not complied with, § 474 is also constitutional.

## III

The District Court correctly determined that the purpose requirement of § 504 is unconstitutional.[14] However, it erred in failing to consider the validity of the remaining portions of the statute that applied to Time. Because the color and size limitations are valid, neither § 474 nor § 504 is unconstitutional on its face or as applied to Time.[15] The judgment of the District Court is accordingly affirmed with respect to the purpose requirement and reversed with respect to the color and size limitations.

*It is so ordered.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

Title 18 U. S. C. § 474, ¶ 6, makes it a federal crime to use pictures of money for any purpose whatsoever, even in the absence of an unlawful intent, and without regard to whether such pictures, or the materials used to make them, might be employed fraudulently. Recognizing that this flat ban sweeps within it a substantial amount of legitimate expression posing virtually no risk of counterfeiting, Congress enacted 18 U. S. C. § 504, which exempts from the ban illustrations of the currency "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," provided such illustrations meet certain restrictions as to form and preparation.

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photographs that do not meet the size requirement. The alternative means of communication left open are almost limitless.

[14] All Justices except JUSTICE STEVENS agree that the District Court was correct to this extent.

[15] The Justices joining this opinion and JUSTICE STEVENS disagree with and reverse the District Court in these respects.

In my view, these two statutes as currently written work together to effect a significant abridgment of expression. And, given the extensive and detailed criminal regulation of counterfeiting found in other parts of Title 18, the two provisions only marginally serve the Government's concededly highly important interest in preserving the integrity of the currency. The Court today does not expressly reject either of these conclusions. Indeed, eight Justices recognize that Congress' obvious and exclusive intent—to permit only those illustrations of currency with "philatelic, numismatic, educational, historical, or newsworthy purposes" and to ban all others—simply cannot constitutionally be achieved through the legislatively chosen means. *Ante*, at 648–649. Nevertheless, JUSTICE WHITE, joined in the judgment on this point by JUSTICE STEVENS, concludes that "neither § 474 nor § 504 is unconstitutional on its face or as applied to Time." *Ante*, at 659.

The key to this paradoxical result lies in the fact that somewhere between the beginning and the end of his opinion, JUSTICE WHITE stops reviewing the statutes enacted by Congress and begins assessing a statutory scheme of his own creation. After identifying separate "purposes" and "publications" conditions for obtaining the § 504 exemption and, correctly in my view, invalidating the former, JUSTICE WHITE proceeds as though the two requirements were written in the disjunctive. He assumes that Congress would have wanted to exempt illustrations satisfying *either* condition and therefore feels authorized to leave one in force while invalidating the other. Accordingly, JUSTICE WHITE proposes simply to excise certain offending words from the integrated clause in which they appear and leaves the rest of the statutory language in place—confident that the revised version of the statute "sufficiently accommodates Time's First Amendment interests," *ante*, at 648, while effectuating "the policies Congress sought to advance," *ante*, at 653.

I certainly agree with the principle that we should construe statutes to avoid constitutional questions, so long as our interpretation remains consistent with Congress' objectives. But, in my view, JUSTICE WHITE's limiting construction of the statutory scheme at issue here neither remains faithful to congressional intent nor rids the legislation of constitutional difficulties. The statutory scheme left in force after JUSTICE WHITE's "remarkable feat of judicial surgery," *Welsh* v. *United States*, 398 U. S. 333, 351 (1970) (Harlan, J., concurring in result), would ban illustrations of currency by all "nonpublishers," even for the kinds of purposes Congress plainly intended to allow, but permit identical illustrations by all "publishers," without regard to the purposes of their illustrations and even if the nature of their media poses a relatively greater risk of counterfeiting. Such a reconstructed scheme bears no relationship to the language, history, or purpose of the statutes as enacted. And, despite the removal of the "purposes" requirement, the revised statutes remain unconstitutional on their face.

## I

Because the Court decides that §§ 474 and 504 are constitutional as applied to Time, it may be useful to review in somewhat more detail precisely how these provisions have been applied to appellee. For many years, Time's various magazines have used pictures of United States currency to illustrate articles concerning political, economic, and sports events. As appellee explains, these pictures have depicted bills "significantly enlarged or reduced in size, discolored or otherwise altered in appearance, shown only in part, and/or substantially obscured by printed legends or overlaid objects." Brief for Appellee 3. In addition, each picture "appeared on only one side of a page," and that page was of the glossy paper used in the production of appellee's magazines. *Ibid.* See 539 F. Supp. 1371, 1377–1379 (SDNY 1982).

Beginning as early as 1965, Time was warned by agents of the Secret Service that such illustrations violated the ban on currency reproductions imposed by § 474 and were not exempt under § 504. App. 29. In the ensuing years, Secret Service agents offered Time several different interpretations of the statutory requirements. At various points, Time was informed (a) that it could print only black and white likenesses of currency of a specified size and only for "numismatic, educational, historical or newsworthy" purposes, *id.*, at 27; (b) that it could never print any photograph of currency in any color or size, because § 504(1) exempts only "illustrations," *ibid.;* and (c) that it could only print likenesses accompanied by "numismatic, educational, historical or newsworthy" information *about* the particular Federal Reserve Note illustrated, *id.*, at 27–28, and could not use likenesses for "decorative or eye-catching purposes," *id.*, at 33.

Relying on these varying constructions of the statutes, Secret Service agents informed Time that it violated federal law when it used partial and distorted likenesses of currency to illustrate articles concerning, among other things, inflation, the effect of economics on an election campaign, a conference on international monetary policy, corporate bribery, and the financial difficulties faced by a "cash-rich" corporation. *Id.*, at 29–34. On several occasions, advance warnings and "slap[s] on the wrist," *id.*, at 34, from the Secret Service led Time's editors to withdraw covers that had been prepared and to substitute illustrations which, in their judgment, were "not nearly as effective in communicating the thought intended to be conveyed as the illustration banned by the Secret Service." *Id.*, at 30.

In May 1981, a Secret Service agent informed Time's legal department that the cover of an issue of Sports Illustrated that had appeared three months earlier violated the counterfeiting statute. The supposedly offending cover, illustrating an article concerning a bribery scandal in amateur basketball, included color reproductions of portions of $100 bills, one-third of actual size, pouring into a basketball hoop. The agent told Time that the Secret Service would seize all materials used in preparation of the cover, asked for the names and addresses of all individuals or companies involved in its production, and requested an interview with a member of Time's management. Ten days later, Time brought this action seeking declaratory and injunctive relief to prevent the Government's enforcement or threat of enforcement of §§474 and 504 against Time.

## II

The linchpin of JUSTICE WHITE's opinion is his view that the words in §504(1) limiting the exemption to illustrations of currency "for philatelic, numismatic, educational, historical, or newsworthy purposes," can be excised from the phrase in which they appear while leaving in force the language that remains, notably the requirement that exempted illustrations appear in certain "publications," that is, "in articles, books, journals, newspapers, or albums." See *ante*, at 649, 652. JUSTICE WHITE acknowledges that, after invalidating the "purposes" requirement, he should decide whether what is left consists of " 'unobjectionable provisions separable from those found to be unconstitutional.' " *Ante*, at 652 (quoting *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U. S. 87, 96 (1909)). But, although he explains why he finds the "publications" requirement "unobjectionable," at least in the context of this case, *ante*, at 650–652, he never explains why the language setting out that condition is "separable" from the rest of the sentence in which it appears.[1]

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[1] In response to this opinion, JUSTICE WHITE denies that he has severed the "publications" requirement from the "purposes" requirement or that he needs to do so in order to reach his result. *Ante*, at 649–650, n. 6, 652, n. 9. But a court must obviously determine the scope of a statutory standard under review before evaluating its constitutionality. From the outset of this litigation, both parties and the District Court have read §504 as establishing a single, unified exemption from the ban against currency illustrations and have assumed, correctly in my view, that each requirement in the statute is a necessary condition for obtaining that exemption. After

In my view, the language of the statute JUSTICE WHITE would leave in force is neither "separable" nor "unobjectionable." Despite his recognition that severability depends "largely" on congressional intent, *ante*, at 653,[2] his deletion of

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correctly striking down the "purposes" requirement, *ante*, at 649, JUSTICE WHITE states that the "publications" requirement "standing alone" may not be challenged here, *ante*, at 649–650. Necessarily, therefore, JUSTICE WHITE believes that the "publications" requirement *can* "stand alone" without the "purposes" requirement.

Because of his construction of the "purposes" language, JUSTICE STEVENS does not reach the question whether the rest of the statute can remain in force without that requirement, consistent with congressional intent. On that issue, the Court is equally divided. Compare *ante*, at 652–656 (opinion of WHITE, J.), with *post*, at 691–692 (POWELL, J., concurring in part and dissenting in part).

I join Part II–A of JUSTICE WHITE's opinion because I find JUSTICE STEVENS' interpretation of the "purposes" requirement impossible to square with either the plain language of the statute or its legislative history. For instance, if, as JUSTICE STEVENS suggests, *post*, at 698–699, § 504 is meant to exempt any illustration in which money is not used for counterfeiting purposes, it is difficult to see why Congress prohibited the use of currency for advertising purposes. And, as I detail below, the history of the statute demonstrates that it was initially enacted, and later amended, in order to exempt from the ban on likenesses of the currency only those illustrations that serve the specific purposes Congress listed. See *infra*, at 668–673. JUSTICE STEVENS, largely ignoring the text of the statute and its history, seems to treat the "purposes" language as though it adds nothing to the "publications" requirement. I believe he thereby carries the principle of construing statutes in order to save them from constitutional attack "'to the point of perverting the purpose of [the] statute . . .' [and] judicially rewriting it." *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964) (quoting *Scales* v. *United States*, 367 U. S. 203, 211 (1961)). Moreover, he leaves the precise meaning of the statutory words he interprets far from clear. Thus, his "attempt to 'construe' the statute and to probe its recesses for some core of constitutionality . . . inject[s] an element of vagueness into the statute's scope and application. . . ." *Aptheker*, *supra*, at 516.

[2] In fact, contrary to JUSTICE WHITE's implication, severability is exclusively a question of legislative intent. See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982). And, like the general rule of construing

a few words from an indivisible phrase in § 504 would work a dramatic change in the scope of the scheme contemplated by Congress. As a result of this exercise in legislative draftsmanship, all members of the ill-defined class of "publishers" meeting the other requirements of § 504 would be exempt from the § 474 ban, regardless of the purposes their illustrations may serve or the risk their illustrations may pose of endangering the currency. Conversely, all "nonpublishers" would be subject to the § 474 ban, even when pursuing the same legitimate purposes through illustrations that pose a similar, or even smaller, threat of counterfeiting. I do not believe this limiting construction of the statutory scheme can be supported by (A) the language and structure of § 504 or (B) its legislative history and purposes. And, as I shall show in Part III, the substantial abridgment of free expression imposed by these statutes, even as JUSTICE WHITE would revise them, renders the remaining language far from constitutionally "unobjectionable."

### A

As relevant here, the version of § 504 passed by Congress exempts from the criminal prohibition against using pictures of the currency

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statutes to avoid constitutional questions from which it derives, *ibid.*, the doctrine of severability "does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives." Cf. *Heckler* v. *Mathews*, 465 U. S. 728, 741 (1984). Instead, courts addressing questions of severability should be guided by Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation." *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518 (1926). See *Califano* v. *Westcott*, 443 U. S. 76, 89–91 (1979); *id.*, at 94–96 (POWELL, J., concurring in part and dissenting in part); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 508–511 (1979) (BRENNAN, J., dissenting); *Welsh* v. *United States*, 398 U. S. 333, 354 (1970) (Harlan, J., concurring in result); *Aptheker* v. *Secretary of State*, *supra*, at 515; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933).

> "(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
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> . . . . .
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> "(C) any . . . obligation or other security of the United States, . . .
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> *"for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums* (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums)." 18 U. S. C. § 504(1) (emphasis added).

The plain language of § 504(1) extends the availability of the exemption from the § 474 ban to those illustrations serving the specified enumerated purposes and to no others. Although the statute also requires such illustrations to appear in certain media, the "purposes" and "publications" restrictions are not written in the disjunctive. They are instead linked by the word "in," indicating that neither is a sufficient condition for claiming the protection of the statute; the only illustrations that are permitted are those that both serve the specified purposes *and* appear "in articles, books, journals, newspapers, or albums." By its terms, therefore, the list of media is a qualification that narrows the scope of the exemption, rather than an independent and severable basis for obtaining permission to use illustrations of the currency.[3]

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[3] Congressional Committees reporting recent amendments to § 504 have also described each of its requirements as necessary conditions for obtaining the protection of the exemption. See, *e. g.*, H. R. Rep. No. 1213, 90th Cong., 2d Sess., 1–2 (1968) (permitted illustrations must "meet the following three conditions" including "purposes" and "publications" restrictions); *id.*, at 4 (must "comply with all of the following conditions"); *id.*, at 6 ("must be for philatelic, educational, historical, or newsworthy purposes,

JUSTICE WHITE initially recognizes that the "purposes" and "publications" restrictions act together to limit the scope of the exemption. See *ante*, at 645–646. Yet, in concluding that Congress would exempt even those "publications" that do not serve the designated "purposes," see *ante*, at 649, JUSTICE WHITE proceeds as though the two requirements were written in the disjunctive. Only by reading the statute as permitting illustrations that meet *either* the "purpose" *or* the "publication" requirement can one conclude that Congress would have wanted the exemption to be available to parties satisfying one condition but not the other.

As far as I am aware, this is the first time that Members of the Court have sought to sever selected words from a single integrated statutory phrase and to transform a modifying clause into a provision that can operate independently.[4] To be sure, Congress could easily have placed the "purpose" and "publication" requirements in separate subsections and connected them with the word "or"; in that event, one might plausibly conclude that one can operate as a basis for exemption without the other.[5] The fact is, however, that Congress

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must appear in certain publications, and must not be used for advertising purposes").

[4] Cf. *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, 83 (1976) (two sentences in one section of statute "must stand or fall as a unit" since they "are inextricably bound together"). See *Philbrook* v. *Glodgett* 421 U. S. 707, 713 (1975) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'"); *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature'"); *Richards* v. *United States*, 369 U. S. 1, 11 (1962) ("a section of a statute should not be read in isolation from the context of the whole Act").

[5] Cf. *EEOC* v. *Allstate Insurance Co.*, 570 F. Supp. 1224 (SD Miss. 1983) (concerning severability of separately denominated legislative veto provision from remainder of statute), appeal dism'd, 467 U. S. 1232 (1984).

*[Footnote 5 is continued on p. 668]*

did not enact the statute in that form, and there is no indication that it intended the statute to operate as though it had. By using the qualifying connective "in"—rather than *"or* in"—Congress must have intended an exemption only for those illustrations "in articles, books, journals, newspapers, or albums" that serve the listed purposes—and not for *any* picture that could be said to appear in the designated media. In short, the very language with which Congress joined the "purposes" and "publications" requirements refutes JUSTICE WHITE's conclusion that they are severable.[6]

## B

Notwithstanding the statute's clearly expressed goal of exempting *only* illustrations with "philatelic, numismatic, educational, historical, or newsworthy purposes," JUSTICE WHITE expresses his confidence that "the policies Congress

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See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 335 (1936) (opinion of Cardozo, J.) ("confirmatory token [of severability] is the formal division of the statute into 'Parts' separately numbered"); *George Hyman Construction Co.* v. *Occupational Safety & Health Review Comm'n*, 582 F. 2d 834, 840, n. 10 (CA4 1978) ("[n]ormally, use of a disjunctive indicates alternatives and requires that they be treated separately unless such a construction renders the provision repugnant to the Act").

[6] There are several other indications in the language and structure of the statute that the "purposes" language imposes an inextricable limitation on the availability of the § 504(1) exemption and that the restrictions as to media were not intended to establish an independent and severable exemption for "publications." First, the *entire* phrase bisected by JUSTICE WHITE is followed by a parenthetical clause setting out a further elaboration of the types of purposes permitted. Thus, both the beginning and the end of the sentence in which the list of fora appears concern permitted *purposes*. Second, when prohibiting illustrations for advertising purposes, the statute exempts advertising related to stamp and coin collecting by using the phrase "in philatelic or numismatic articles, books, journals, newspapers, or albums"—confirming that the listed purposes act as inseparable limitations on the enumerated media. Third, § 504(2) expressly exempts movies and slides without regard to their purpose unless they are converted into prints, in which case the "purposes" requirements of § 504(1) apply. Deletion of the "purposes" language would render meaningless this express distinction between the two parts of the statute.

sought to advance by enacting § 504 can be effectuated" even though that standard is unenforceable. *Ante,* at 653. He never explains, however, how congressional policies might be advanced with the "purposes" language deleted and the "publications" requirement left in force. Indeed, he never indicates just what function he believes the list of publications in the statute was intended to serve. We cannot, however, properly conclude that the "publications" requirement can be left "standing alone," *ante,* at 649–650, without considering how that requirement relates to the overall objectives of the statutory scheme. A review of the history and purposes of the statutory scheme provides no support for the conclusion that Congress would want to extend special protection to all illustrations in "publications" and to ban the pictures of "nonpublishers," without regard to whether either group's illustrations serve "philatelic, numismatic, educational, historical, or newsworthy purposes."

### (1)

Consistent with the plain language of § 504, the statute's legislative history confirms that it was originally adopted, and later amended, in order to exempt from the otherwise comprehensive ban on likenesses of the currency only those illustrations that serve the specific purposes Congress deemed worthy of special protection. At the outset, it is crucial to recall the breadth of Congress' total ban on all illustrations of the currency, a prohibition that was hurriedly adopted as part of comprehensive emergency legislation designed to fund the Civil War, see *ante,* at 643–644, and n. 1, and that has been reenacted with little explanation and only minor changes in wording in every subsequent revision and codification of the Federal Criminal Code. See Brief for Appellee 6–8.

Beginning nearly 60 years after the broad prohibition was first enacted, Congress grew concerned that the prohibition swept within it a number of legitimate activities posing little threat of counterfeiting. Accordingly, in a succession of enactments, Congress fashioned certain exceptions for specific activities it found worthy of special protection. It began with stamp collecting, an activity whose importance to those who drafted and amended § 504 is still evident in the structure of the current version. The crucial language in the present statute first came into the criminal code in 1923 with "[a]n Act to allow the printing and publishing of illustrations of foreign postage and revenue stamps from defaced plates." Ch. 218, 42 Stat. 1437. As its statement of purpose indicates, that statute was passed in recognition of the fact that "[t]here are a great many stamp collectors in this country, and [the statute's] purpose was to permit them to issue and gather together defaced stamps and print them for the benefit usually of children." 64 Cong. Rec. 4976 (1923) (remarks of Sen. Cummins). Although Congress achieved this aim by protecting certain kinds of publications, the language it employed makes it crystal clear that it intended to exempt only publications serving the specified purpose of stamp collecting. Thus, the statute allowed illustrations only "in *philatelic or historical* articles, books, journals, albums, or the circulars of legitimate publishers or dealers in [designated] stamps, books, journals, albums or circulars," ch. 218, 42 Stat. 1437 (emphasis added), plainly indicating that the listed publications could carry the permitted illustrations only if they were of a "philatelic or historical" nature. Accordingly, an exemption for activities with the specified purpose was the exclusive object of the legislation and was intended to qualify its scope.

In 1937, the statute was amended to extend its protection to undefaced foreign stamps and to allow the Treasury Department to regulate exempted uses, ch. 10, 52 Stat. 6. See S. Rep. No. 1159, 75th Cong., 1st Sess., 3 (1937). The new version, now entitled "an act [t]o permit the printing of black-and-white illustrations of United States and foreign postage stamps for philatelic purposes," ch. 10, 52 Stat. 6, carried forward the original restriction to publications concerned with stamp collecting and slightly enlarged the group of publications so protected. In a stylistic clarification that highlights the centrality of the "purposes" requirement, the 1937 amendment also introduced the sentence structure that remains in the statute today: Whereas the 1923 statute exempted only illustrations in "philatelic or historical books, journals, albums or circulars," the 1938 revision permitted illustrations "for philatelic purposes *in* articles, books, journals, newspapers, or albums . . . ." *Ibid.* (emphasis added). This modification, which established the basic form of the current provision, extended the exemption to the five types of publications listed, *but only if they used the illustrations for "philatelic purposes."* Congress thereby indicated its unmistakable intention that the "purpose" requirement would continue to play the central role in the availability of the exemption.[7]

The exemption was amended again in 1958 in order to extend its protection to illustrations of United States obligations other than stamps and to expand the range of specified purposes for which such illustrations could be used. Pub. L. 85–921, 72 Stat. 1771. This revision retained the sentence structure of the 1938 statute, including its list of permissible media. And, as before, the legislative history makes clear that Congress intended the "purposes" restriction to continue to act as a central and indispensable qualification on the scope of the exemption. For instance, the Committee Reports say nothing about specially favored "publications" when they explain that the purpose of the bill, as relevant here, is to "[p]ermit black and white illustrations of United States and foreign paper money and other obligations and securities

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[7] In 1948, as part of a general codification of the criminal laws, the exemption, with only "[m]inor changes in phraseology" not relevant here, H. R. Rep. No. 152, 79th Cong., 1st Sess., A40 (1945), was given its current section number and a shorter title, "PRINTING STAMPS FOR PHILATELIC PURPOSES." 62 Stat. 713.

*for educational, historical, and newsworthy purposes.*" H. R. Rep. No. 1709, 85th Cong., 2d Sess., 1 (1958); S. Rep. No. 2446, 85th Cong., 2d Sess., 3 (1958) (emphasis added). See also H. R. Rep. No. 1709, at 7; S. Rep. No. 2446, at 8. Nor do the Reports indicate any special solicitude for "publications" when they state that the bill is meant to codify the Treasury Department's practice of permitting "exceptions to [§ 474] by granting special permission to use illustrations of United States bonds and paper money *for numismatic, historical, and educational purposes.*" H. R. Rep. No. 1709, at 3; S. Rep. No. 2446, at 5 (emphasis added).[8] Indeed, the only illuminating reference in the Reports to the "publications" requirement,[9] indicates that it was intended simply to ensure that illustrations for the permitted purposes not take the form of "*facsimiles* in the likeness of paper money or other obligations," H. R. Rep. No. 1709, at 4; S. Rep. No. 2446, at 6 (emphasis added). In light of the fact that existing law already controlled the use and possession of facsimiles for *illegitimate* purposes,[10] that reference only strengthens the conclusion that the sole objective of § 504 was to permit illustrations for purposes Congress considered worthwhile.[11]

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[8] The Committee Reports refer to regulations promulgated by the Treasury Department to enforce the existing exemption for illustrations with "philatelic purposes in articles, books, journals, newspapers, or albums." H. R. Rep. No. 1709, at 2; S. Rep. No. 2446, at 4. Not surprisingly, there is nothing in the cited regulations suggesting a special effort to prevent illustrations in "nonpublications," much less to define such a classification. See 31 CFR § 402.1 (1959) (granting permission "to make, hold and dispose of black and white reproductions of canceled United States internal revenue stamps: *Provided,* That such reproductions are made, held and disposed of as part of and in connection with the making, holding, and disposition, for lawful purposes, of the reproductions of the documents to which such stamps are attached"); § 405.1 (permitting illustrations of war bonds "for publicity purposes" without restriction as to forum).

[9] It is true, as JUSTICE WHITE notes, *ante,* at 651, and n. 6, that the examples given by the Committees of people who might wish to use illustrations of money for legitimate purposes—textbook and newspaper publishers, collectors of paper money, and historians—could all be said to involve "publications." There is no indication in the legislative history, however, that these examples were meant to be exclusive.

Given this history, it is clear that the central objective of § 504—its very essence—was to exempt *only* illustrations "for philatelic, numismatic, educational, historical, or newsworthy purposes." Having concluded that this objective cannot constitutionally be achieved through the legislatively chosen means, JUSTICE WHITE therefore errs in simply deleting the crucial statutory language and using the words that remain as the raw materials for a new statute of his own making.

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[10] Independent of the provisions at issue here, several other parts of the extensive statutory scheme designed to prevent counterfeiting control the possession of items which, by virtue of their size, shape, or consistency, look like pieces of currency. For instance, § 474, ¶ 5, the provision immediately preceding the one invoked against appellee, imposes criminal liability on anyone who "has in his possession or custody . . . any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same . . . ." In *United States* v. *Turner*, 586 F. 2d 395, 397–399 (CA5 1978), the Court of Appeals sustained the conviction, under § 474, ¶ 5, of an individual who possessed a number of one-sided photocopies of dollar bills of a kind that had been used successfully to defraud change machines. See also § 474, ¶ 4; *United States* v. *Dixon*, 588 F. 2d 90, 91–92 (CA4 1978); *Koran* v. *United States*, 408 F. 2d 1321 (CA5 1969); *Webb* v. *United States*, 216 F. 2d 151 (CA6 1954).

[11] In 1968, the exemption was amended so as to permit colored illustrations of stamps. Pub. L. 90–353, 82 Stat. 240. Although the Committee Reports explaining this amendment referred to the "publications" requirement, they continued to describe satisfaction of the "purposes" requirement as a necessary condition for obtaining the statutory exemption. See H. R. Rep. No. 1213, 90th Cong., 2d Sess., 1–2, 4, 5, 6 (1968); S. Rep. No. 1206, 90th Cong., 2d Sess., 1–2, 4, 5, 7 (1968). See n. 2, *supra*.

The statute was amended again in 1970 in order to include postage meter stamps within its protections. Pub. L. 91–448, 84 Stat. 921. See H. R. Rep. No. 91–640, p. 1 (1969).

### (2)

In light of the history and obvious objective of the statute, an independent "publications" requirement standing alone makes little sense. As appellants now seem to acknowledge,[12] the most plausible explanation for the requirement that illustrations serving the listed purposes appear "in articles, books, journals, newspapers, or albums" is that Congress thereby intended to provide further elaboration as to the general sorts of activities it wished to allow while seeking to ensure that the exemption not be used to justify the creation of likenesses so physically similar to genuine currency that they could be used fraudulently. Appellants therefore suggest that the "purpose" and "forum" language work *together* to establish a single standard for exemption that is "descriptive and illustrative, rather than prescriptive and mandatory." Brief for Appellants 28. They thus read the entire phrase that JUSTICE WHITE would split in two as limiting the exemption's availability to legitimate "publications," broadly understood, as distinguished from potentially deceptive "facsimiles."

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[12] The Government's construction of the statutory scheme it enforces has hardly been a model of consistency. As noted above, the Secret Service has adopted at least three different interpretations of the exemption during the years it has overseen the work of Time's editors and art directors. See *supra*, at 662. And even over the course of this litigation, appellants have frequently shifted their position. In the District Court, they seemed to depart from a construction of § 504 published in a Department of Treasury pamphlet but left its precise reading of the statute extremely unclear. See Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment 26, n. In their jurisdictional statement in this Court, appellants appeared to disavow the Treasury Department's published construction of the exemption. Juris. Statement 15, n. 9. And, finally, sometime between the filing of the jurisdictional statement and briefing on the merits, the Treasury Department itself abandoned its most recent interpretation of § 504 and amended its pamphlet, which now apparently conforms to the position the Government has taken in this Court. See Brief for Appellants 28, n. 18.

This interpretation ascribes far more rationality to Congress than would any suggestion that, in order to obtain the benefit of the exemption, an illustration must literally "appear in one of the enumerated publications," cf., *ante,* at 651, n. 8. It is difficult to imagine why Congress would have considered only pictures "in articles, books, journals, newspapers, or albums"—as distinct from those on, say, leaflets or posters—sufficiently important or legitimate to warrant a special exemption from the § 474 ban.[13] Nor could the apparent arbitrariness of a special exemption for just the listed "publications" be justified by reference to Congress' desire to minimize the risk of counterfeiting. Although a limitation to the expressly listed media might exclude "facsimiles," there are numerous other media for expression not found in the statutory list that do not come close to resembling slips of paper in the shape and consistency of Federal Reserve Notes. It could hardly be contended, for example, that depictions of the currency on billboards, placards, or barnyard doors pose a greater threat of counterfeiting than identical illustrations in "articles, books, journals, newspapers, or albums." And, finally, although a restrictive reading of the "publications" requirement might arguably serve Congress' undoubted wish "to relieve the Treasury Department of the burden of processing numerous requests for special permission to use photographic reproductions of currency," *ante,* at 653, mere "administrative convenience," independent of any substantive objective, was plainly not the primary legislative goal. To the contrary, the legislative history of § 504 confirms that Congress' substantive objective in enacting a specific exemption from the § 474 ban was to grant special permission for illustrations serving specified purposes, and not to permit illustrations in certain publications simply because such an exemption would be easy to administer.[14]

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[13] If § 504 permitted illustrations only in the enumerated publications on the theory that—without regard to their potential use in counterfeiting relative to unlisted media—the specified media are the only places in which "legitimate" illustrations will appear, it would, of course, rest on a distinction among otherwise identical communications according to an utterly undefined and unjustified Government selection of preferred speakers. Cf. *Police Department of Chicago* v. *Mosley,* 408 U. S. 92 (1972).

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[14] The same flaw undermines JUSTICE WHITE's conclusion that the color and size requirements of § 504 could stay in force consistent with congressional intent even if, contrary to his conclusion, *ante*, at 651–652, the "publications" requirement is unconstitutionally overbroad. See *ante*, at 652–653. In support of this hypothesis, JUSTICE WHITE states that "[t]here is no indication that Congress believed that the purpose requirement either significantly eased the Treasury Department's burden or was necessary to prevent the exception from being used as a means of circumventing the counterfeiting laws." *Ante*, at 654–655. But this argument only defeats a straw man. The "purposes" requirement was obviously not meant to make the exemption easier to administer or to prevent its abuse. It was, instead, the substantive reason for enacting the exemption in the first place. If the only function of § 504 was to "ease the administrative burden without undermining the Government's efforts to prevent counterfeiting," *ante*, at 654, no list of permissible purposes would have been necessary or even desirable. Congress could have written a statute far easier to administer by simply exempting all illustrations satisfying the color and size requirements—in effect, substantially repealing the § 474, ¶ 6, ban. The fact that it did not do so demonstrates that its intention was far more limited than to exempt any illustration that is administratively convenient to identify. Contrary to the premise of JUSTICE WHITE's severability discussion, the language, legislative history, purpose, and administrative construction of § 504 from its beginnings in the 1920's to amendments in 1969 demonstrate unequivocally that the whole point of this exemption from the longstanding flat ban was to permit illustrations with the specified purposes and no others.

There is also a rather significant linguistic obstacle to JUSTICE WHITE's view. The statute imposes the color and size restrictions on "[i]llustrations permitted by the foregoing provisions of this section." With both the "purposes" and the "publications" requirements deleted, the "foregoing provisions" permit, as relevant here, "the printing . . . of . . . any . . . obligation or other security of the United States"—that is, *they permit everything prohibited by § 474, ¶ 6*. The sentence limiting the exemption to illustrations "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums" is therefore clearly the heart of the exemption, and the remaining provisions are meant only to ensure that the central objective of permitting certain specified

Accordingly, I agree with appellants that the list of publications cannot sensibly reflect a congressional intention to confer special status on the particular media listed. Instead, those words are best read as operating in necessary conjunction with the "purposes" requirement to provide enforcement authorities with general guidance as to the particular kinds of "legitimate" activities Congress meant to protect while permitting those authorities to exclude uses in media whose form or appearance present too serious a risk of fraud. On this construction, however, the two requirements are so completely intertwined as to be plainly inseverable; they constitute a single statutory provision which operates as an integrated whole. They therefore "must stand or fall as a unit." Cf. *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, 83 (1976).

## III

A court's obligation to leave separable parts of a statute in force is consistent with its general duty to give statutes constructions that avoid constitutional difficulties. See *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982). Accordingly, in order to uphold a portion of an unconstitutional statute, a court must determine not only whether the legislature would have wanted that part to remain in effect, but also whether "what is left" is itself constitutional. See *Buckley* v. *Valeo*, 424 U. S. 1, 108–109 (1976). For the reasons I have set out in Part II, I cannot agree that Congress would have retained § 504 as presently written without the "purposes" requirement. Even if I am wrong, however, and JUSTICE WHITE's limiting construction of the statutory scheme is faithful to congressional intent, I would still reject that interpretation. In my view, the statutory scheme, even

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legitimate activities is achieved without increasing the risk of counterfeiting. Without that central objective, those administrative safeguards cannot meaningfully be wrenched from the section and turned into ends in and of themselves.

without the "purposes" requirement, remains unconstitutional on its face.

Because the First Amendment interests at stake in this case are denigrated by the Government, Brief for Appellants 20, and all but ignored by JUSTICE WHITE, it becomes necessary to emphasize their nature and importance. The adage that "one picture is worth a thousand words" reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute.[15] And, as a cursory examination of the magazine covers at issue in this case vividly demonstrates, the image of money in particular is an especially evocative and powerful way of communicating ideas about matters of public concern, ranging from economics to politics to sports. See 539 F. Supp., at 1383. Contrary to appellants' contention, Brief for Appellants 20, a statute that substantially abridges a uniquely valuable form of expression of this kind cannot be defended on the ground that, in appellants' judgment, the speaker can express the same ideas in some other way.[16]

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[15] Cf. *Spence* v. *Washington*, 418 U. S. 405, 410 (1974) *(per curiam)*; *Tinker* v. *Des Moines School District*, 393 U. S. 503, 505–514 (1969); *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). In describing the expressive value of symbols like that at issue here, it is difficult, as is so often the case, to improve upon Justice Jackson's eloquence:

"Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their following to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 632–633 (1943).

[16] *E. g., City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 812 (1984); *United States* v. *Grace*, 461 U. S. 171, 180–184

Even as JUSTICE WHITE would revise it, the statutory scheme at issue here works just such a substantial abridgment of speech for significant numbers of individuals who might wish to use illustrations of the currency for perfectly legitimate reasons and in ways that pose no serious risk of counterfeiting. Depending on which of two interpretations of the "publications" requirement is adopted, such illustrations are either (A) allowed, if at all, only when licensed by Secret Service agents enforcing an utterly standardless statutory definition of "illustrative" uses or (B) completely prohibited because they do not literally appear "in articles, books, journals, newspapers, or albums." Cf. *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 963, n. 11 (1984).

### A

An independent "publications" requirement has not, until today, been understood as the critical element in the statutory scheme even by the Government. See *supra*, at 674–677.[17] We therefore have little basis on which to determine

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(1983); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 501–502, 516 (1981) (plurality opinion); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 78 (1981) (BLACKMUN, J., concurring); *id.*, at 79 (POWELL, J., concurring); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93 (1977); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 556–558 (1975); *Spence* v. *Washington*, *supra*, at 411, n. 4; *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

Aside from the fact that the Government simply has no business second-guessing editorial judgments as to the communicative value of illustrations, cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), appellants have made no effort to contest the sworn affidavits of appellee's editors and art directors that illustrations of the currency constitute a unique and irreplaceable means of communicating many ideas at the heart of First Amendment protections. See, *e. g.*, App. 75, 84, 89–90, 96–97, 102–103.

[17] Indeed, appellants claim that neither the "purpose" nor the "publications" requirements of § 504 "have ever served as a basis for enforcement of the statute." Juris. Statement 13. (With respect to the "purposes" requirement, the appellants' contention is contradicted by Time's undisputed affidavits, App. 27–28, and the findings of the District Court, 539 F. Supp., at 1377–1379).

precisely what kinds of illustrations it permits and what kinds it prohibits. Yet JUSTICE WHITE refuses to consider the scope of the statutory language he would sustain because of his confidence that those words will in no event pose problems for appellee. *Ante*, at 649.[18] But, given appellee's overbreadth challenge, we cannot avoid engaging in an assessment of the statute's reach and, therefore, of its possible vagueness. As the Court reaffirmed just last Term, "we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender* v. *Lawson*, 461 U. S. 352, 358–359, n. 8 (1983). See also *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494, 495, 498–499 (1982). It is difficult to understand how JUSTICE WHITE, having rejected the Government's interpretation of the statute, can so easily "assume that the legitimate reach of § 504 'dwarfs its arguably impermissible applications' to nonpublishers," *ante*, at 651–652, without providing some explanation as to just what a "nonpublisher" may be. In order to evaluate Time's claim that "the statute is unconstitutional in a substantial portion of the cases to which it applies," *ante*, at 650, we must consider how it applies to other cases—even if its application to appellee may be clear.[19]

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[18] JUSTICE WHITE's rejection of Time's vagueness challenge, like his statement that "we may assume that the legitimate reach of § 504 'dwarfs its arguably impermissible applications' to nonpublishers," *ante*, at 651–652, neglects the fact that the "publications" requirement—which the Government disclaims ever using—has only become central to the statutory scheme by virtue of his severability conclusion. As a result, we have no way of gauging the meaning of that provision either with respect to its "arguably impermissible applications" or as it may be applied to Time, Inc.'s various activities, which undoubtedly include the use of illustrations of its covers in billboards, posters, or other "nonpublications." JUSTICE WHITE's conclusions on these points rest on assumptions of fact as to issues that, until now, appellee has had no reason to address because neither the parties nor the District Court anticipated the surprising suggestion that we excise the first part of the sentence in which the "publications" requirement appears and leave the rest standing. At a minimum, therefore, the case should be remanded to give appellee an opportunity to demonstrate how the newly independent "publications" requirement might apply to itself or others. Cf. *Kolender* v. *Lawson*, 461 U. S. 352, 369–371 (1983) (WHITE, J., dissenting).

As I have noted, *supra*, at 672–673, appellants' interpretation of the statute licenses the Treasury Department to determine, on a necessarily ad hoc basis, whether a given picture appears in a medium of which the statutory list is "illustrative" or whether, instead, its medium looks too much like the kind of "facsimiles" prohibited by other parts of the statutory scheme. This construction might enable many people using pictures of the currency for legitimate purposes to avoid criminal liability, but it creates precisely the sorts of constitutional infirmities that have led the Court to invalidate the "purposes" requirement. As read by appellants, the "publications" requirement vests in Secret Service agents, monitoring the enormous variety of uses to which pictures of the currency can be put, virtually unconstrained authority to decide whether a given illustration imposes criminal liability on its author or not. Cf. *Kolender* v. *Lawson*, *supra*, at 358–361.[20] Such unguided discretion inevitably poses a serious risk of government discrimination on the basis of content or subject matter. Cf. *Lovell* v. *Griffin*, 303 U. S. 444, 451–452 (1938). See *ante*, at 648–649 ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). See generally *Hynes* v. *Mayor of Oradell*,

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[19] See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 954–959 (1984); *City Council of Los Angeles* v. *Taxpayers for Vincent*, *supra*, at 798–799; *New York* v. *Ferber*, 458 U. S., at 772–774; *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634–639 (1980); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615–618 (1973).

[20] See *Wagner* v. *Simon*, 412 F. Supp. 426 (WD Mo.), aff'd, 534 F. 2d 833 (CA8 1976) (upholding confiscation by Secret Service agents of 3-foot long political protest poster depicting bill made to appear as a "$30 Inflationary Note" with picture of President Nixon at center); Washington Post, Nov. 17, 1983, p. B1 (reporting that Secret Service agents ordered municipal lottery board to stop using advertising posters that depict $1,000 bills).

425 U. S. 610 (1976). And because § 474, ¶ 6, unlike the other counterfeiting provisions in Title 18, imposes criminal liability without any showing of unlawful intent, construing § 504 to exempt only those uses deemed legitimate by enforcement authorities would render the statutory scheme "little more than 'a trap for those who act in good faith.'" *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979) (quoting *United States* v. *Ragen*, 314 U. S. 513, 524 (1942)).

Accordingly, if, as appellants suggest, the "publications" requirement is only "descriptive and illustrative" of the kinds of uses Congress intended to permit and its precise meaning must be left to case-by-case judgments by Secret Service agents, people "whose First Amendment rights are abridged by [§ 474, ¶ 6, will] have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the [Secret Service]." Cf. *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S., at 964, n. 12. On that interpretation, the statutory scheme upheld today is unconstitutional on its face "because it [is] apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 797 (1984) (footnote omitted). See also *Kolender* v. *Lawson*, *supra*, at 358–359, n. 8.[21]

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[21] See *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it"); *Lovell* v. *Griffin*, 303 U. S. 444, 451–452 (1938) ("We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship"); *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931) ("A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of [the] opportunity [for free politi-

### B

Insofar as his opinion reveals, however, JUSTICE WHITE appears to assume that the list of media is not "illustrative" as appellants suggest, but rather strictly limited to "articles, books, journals, newspapers, or albums." See *ante*, at 649, n. 5, 650, and nn. 6 and 7. Assuming, *arguendo*, that so construed the list of media is sufficiently definite to prevent arbitrary enforcement,[22] it presumably excludes illustrations of the currency—without regard to size, color, or capacity to deceive—on such items as placards, billboards, pamphlets, bumper stickers, leaflets, posters, artist's canvasses, and signs. Unlike JUSTICE WHITE, I have little trouble concluding that, by imposing criminal liability on persons making such illustrations without any showing of unlawful intent, the prohibition created by the "publications" requirement renders this penal scheme "'susceptible of sweeping and improper application.'" *Bigelow* v. *Virginia*, 421 U. S. 809, 816 (1975) (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). As appellee notes:

> "[E]qually banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a $20 bill; a green, six-foot enlargement of the portrait of George Washington on a $1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, 'In God We Trust', on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist's rendering of a 'shrinking' dollar bill, borne by a striking worker

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cal discussion] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment"). See generally *Colautti* v. *Franklin*, 439 U. S. 379 (1979).

[22] There is, however, much truth in the District Court's observation that "[t]he definition of a journal, newspaper or album is anyone's game to play." 539 F. Supp., at 1390. Cf. *Branzburg* v. *Hayes*, 408 U. S. 665, 703–705, and n. 40 (1972).

to epitomize his demand for higher wages in a period of inflation." Brief for Appellee 5–6.

I do not, of course, suggest that each of the people making and displaying these sorts of depictions will be deterred from doing so by potential enforcement of the broad statutory scheme upheld today. I have no doubt, however, that substantial numbers of them will be, particularly if advised by lawyers aware of today's decision. Cf. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 217 (1975).[23] To take a single example, a poster artist with a reasonably competent attorney would certainly think twice before risking his resources on the kind of political protest attempted by the defendant in *Wagner* v. *Simon*, 412 F. Supp. 426 (WD Mo.), aff'd, 534 F. 2d 833 (CA8 1976). See n. 20, *supra*. JUSTICE WHITE brushes this prospect aside with the statement that "one arguably unconstitutional *application* of the statute does not prove that it is substantially overbroad, particularly in light of the numerous instances in which the requirement will easily be met." *Ante*, at 651, n. 7 (emphasis added). But this remark misses the entire point of the overbreadth doctrine. Our willingness to entertain overbreadth challenges is based, not on concern with past applications of an unconstitutional statute to completed conduct, but rather on the recognition that "persons whose expression is constitutionally protected may well *refrain* from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U. S. 518, 521 (1972) (emphasis added).[24]

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[23] See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S., at 967–968 ("Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack" (footnote omitted)); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S., at 800, n. 19 ("where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack").

By imposing criminal liability without fault on those who use pictures of money for any purpose whatsoever unless the pictures appear in "publications," the statutory scheme at issue here plainly amounts to "a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest" of the Government. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636 (1980). The governmental interests putatively served by the scheme—the detection and prevention of counterfeiting—are, of course, substantial. But the many other criminal provisions aimed at counterfeiting, together with the various exceptions to the § 474, ¶ 6, ban, demonstrate that those interests "are only peripherally promoted" by the provisions at issue here and "could be sufficiently served by measures less destructive of First Amendment interests." *Ibid.*

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[24] See also *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, *supra*, at 964–968; *City Council of Los Angeles* v. *Taxpayers for Vincent*, *supra*, at 798–799; *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S., at 634; *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 216–217 (1975); *Bigelow* v. *Virginia*, 421 U. S. 809, 815–817 (1975); *Broadrick* v. *Oklahoma*, 413 U. S., at 612.

The passage in the text that I have quoted from Time's brief, *supra*, at 683–684, setting out examples of potential applications of the statutory scheme to protected conduct, belies JUSTICE WHITE's statement that the *Wagner* case is "the only concrete example brought to our attention by Time." *Ante*, at 651, n. 8. Furthermore, as the very portion of Time's brief cited by JUSTICE WHITE demonstrates, appellee did *not* in fact contend below that "it had standing to challenge the *publication* requirement because of the overbreadth doctrine." *Ante*, at 652, n. 8 (emphasis supplied). See Brief for Appellee 41, n. 29 ("One of Time's major assertions has been and remains that § 504 continues § 474, ¶6's proscription of considerably more expression than is necessary to prevent counterfeiting"). Instead, Time argued that § 504 as a whole—which until today's decision was understood by no one to have severable "purposes" and "publications" requirements—was overbroad. See 539 F. Supp., at 1377. The precise factual basis for Time's overbreadth argument is, in any event, beside the point. Given the argument, we are obliged to determine *as a matter of law* whether the statute is "'susceptible of sweeping and improper application.'" *Bigelow* v. *Virginia*, *supra*, at 816 (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). See generally *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, *supra*.

The strongest evidence that the important Government interest in preventing counterfeiting may be served by means less restrictive of free expression than those upheld today can be found in the numerous other provisions of Title 18 designed to serve that end.[25] Appellants contend that §§ 474, ¶ 6, and 504 add an essential additional weapon to this extensive enforcement arsenal. Although they have not been entirely consistent on the point, see n. 12, *supra*, appellants currently advance two ways in which these provisions enable

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[25] Wholly apart from the statutes at issue here, it remains a crime to forge, counterfeit, or alter any United States obligation with intent to defraud, § 471; to pass, utter, publish, or sell (or attempt to do so), or to import, possess, or conceal a forged, counterfeited, or altered obligation with intent to defraud, § 472; to buy, sell, exchange, transfer, receive, or deliver any forged, counterfeited, or altered obligation with the intent that the same be passed, published, or used as true and genuine, § 473; to possess, with intent to forge or counterfeit, a plate, stone, or other thing (including photographic negatives) which resemble plates used to make currency, § 474, ¶ 4; to possess, take, sell, or make an impression from any tool, implement, instrument, or thing used for printing or making other tools or things used for printing obligations of the United States, §§ 475, 476; to place or connect together, with intent to defraud, different parts of two or more notes, bills, or other instruments issued by the United States so as to produce one instrument, § 484; and to make, use, or pass any "thing similar in size and shape" to United States currency in order to "procure anything of value" from any machine or other device designed to receive or be operated by lawful currency, § 491. See also § 474, ¶¶ 1, 2, 3, 5, 7 (other provisions regulating possession and use of materials employed in counterfeiting); § 492 (providing for forfeiture of "articles, devices, and other things made, possessed, or used in violation" of other provisions as well as of "any material or apparatus used or fitted or intended to be used" in counterfeiting "found in the possession of any person without authority from the Secretary of Treasury").

"the Secret Service to operate more effectively in tracing and identifying the source of counterfeit bills," Brief for Appellants 21. First, they contend that the ban on illustrations prevents the creation of "facsimiles" that, however innocent their purpose, could be passed off as genuine pieces of currency. See *id.*, at 34–35. It is, however, difficult to believe that the distorted and discolored pictures of portions of the currency that Time has placed on its covers have a serious capacity to deceive. Moreover, the "publications" requirement, if construed in a way to avoid potentially arbitrary enforcement, works to prohibit illustrations in numerous media—such as billboards, placards, posters, and walls—that are a far cry from "facsimiles" and that, indeed, bear less of a physical resemblance to actual money than pictures in "publications" might.

Second, appellants claim that, without §§474, ¶6, and 504, "counterfeiters would more readily be able to conceal their criminal conduct by associating with legitimate print shops, thereby availing themselves of an instant alibi for manufacturing and possessing currency negatives." *Id.*, at 21 (footnote omitted). But this argument is hard to take seriously, especially in light of the construction of the statutory scheme advanced by JUSTICE WHITE. For one thing, the plates and negatives manufactured by appellee for its covers are capable of producing only replicas of the distorted and discolored pictures of portions of currency for which they were made. See 539 F. Supp., at 1387; App. 76; n. 27, *infra.* And producing such plates hardly enhances the capacity or opportunity of those with access to legitimate printing facilities to produce other plates more useful in counterfeiting. Moreover, if the object of the ban is to minimize the counterfeiting possibilities created by the activities of legitimate printshops, that object is, to put it mildly, ill-served by a statute that prohibits only illustrations created by "nonpublishers." Finally, in an age of easy access to high-quality printing, ranging from the office copying machine to the sophisticated photo-offset equipment of printers for hire, the notion that a would-be counterfeiter would use the plates created for appellee's magazine covers—instead of copying actual pieces of currency—strains credibility.

The degree to which a statutory ban on a form of expression substantially furthers legitimate state interests may often be assessed by consideration of its exceptions.[26] As originally enacted, and as JUSTICE WHITE would reinterpret it, the statutory scheme at issue here is riddled with arbitrary distinctions between lawful and unlawful activities that undermine appellants' claim that the scheme substantially furthers the Government's legitimate interests. Pictures appearing in the broad, but undefined, class of "nonpublications" are prohibited without regard to their manner of production, size, shape, color, composition, or capacity to deceive anyone. But pictures manfactured by "publishers," whose facilities would presumably be more useful to counterfeiters, see Brief for Appellants 21–22, as well as color slides of actual pieces of currency, § 504(2), are permitted. Likenesses appearing on newsprint or quality paper stock may be allowed, but apparently not those made of wood, plastic, or cardboard. A picture of a small portion of currency painted orange and appearing on a protest sign is prohibited, while a "publisher" may manufacture an enlarged negative which can be used to print the front of a dollar bill in its natural black and white.[27]

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[26] See, *e. g.*, *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S., at 636; *Metromedia, Inc.* v. *San Diego*, 453 U. S., at 514 (plurality opinion); *Schad* v. *Mount Ephraim*, 452 U. S., at 72–77.

[27] Because I believe that the "purposes" and "publications" language in § 504(1) is inseparable from the statute's various conditions intended to ensure that exempted illustrations do not too closely resemble actual currency, see n. 14, *supra*, I need not consider whether the color and size limitations could constitutionally form part of a more carefully crafted statutory scheme and I therefore express no view on the constitutionality *vel non* of those requirements. The Court's decision to uphold the color

In sum, if the "publications" requirement has sufficiently definite content to prevent its arbitrary enforcement, the statutory scheme upheld today is fatally overbroad. The

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restriction in the context of *this* statutory scheme, however, suffers from two serious flaws that should not pass without comment.

*First*, JUSTICE WHITE upholds the statute's apparently irrational distinction between black and white pictures and those appearing in, say, pink or orange on the basis of what may be the weakest conceivable kind of legislative history: A statement by a party to this litigation submitted to Congress three days after that party had filed its notice of appeal in this Court and concerning legislation that has not been reported out of committee, much less passed by either House of Congress. See App. D to Juris. Statement (transmitting to House Subcommittee statement of Deputy Assistant Secretary of Treasury on H. R. 4275). There is no indication whatsoever in the legislative history of the statute actually passed by Congress that color prints were excluded because they require more negatives to produce, thereby "increas[ing] a counterfeiter's access," *ante*, at 657, to materials that can be used illegitimately. Instead, it seems obvious that the color restriction was intended to minimize the possibility that permitted illustrations could be passed off as the genuine article. See, *e. g.*, 64 Cong. Rec. 4976 (1923) (remarks of Sen. Cummins) ("Mark you, these stamps are to be printed in black and white, not in color, and they are to be defaced, so that they can not possibly be used again").

*Second*, the *post hoc* justification offered by appellants for the color restriction in the statute as now written cannot satisfy the requirement that "viewpoint neutral" regulations abridging speech must be narrowly tailored to achieve substantial governmental interests. See, *e. g.*, *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S., at 808; *Clark* v. *Community for Creative Non-Violence*, *ante*, at 293–294; *Brown* v. *Glines*, 444 U. S. 348, 354–355 (1980); *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974); *Erznoznik* v. *City of Jacksonville*, 422 U. S., at 217–218; *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *id.*, at 388 (Harlan, J., concurring). Appellants have made no effort to controvert appellee's claim, based on uncontested affidavits accepted by the District Court, that "[w]hatever the practices of professional counterfeiters might be, all of Time's four color separations of currency contain every obscuring feature and distortion of the ultimate picture, and thus are useless to the counterfeiter." Brief for Appellee 44 (footnote omitted). See 539 F. Supp., at 1387, and n. 19. See generally H. Simon, Color in Reproduction 59–65 (1980). These distortions demonstrate that, contrary to JUSTICE STEVENS' assertion, *post*, at 700–701, Time *does* wish to use "illustrations extensive and detailed provisions regulating counterfeiting in other parts of Title 18 as well as the numerous eccentric exceptions to the statutes at issue here demonstrate that the flat ban imposed by these penal provisions on a wide variety of expression posing no conceivable danger of counterfeiting is far "'greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Seattle Times Co.* v. *Rhinehart,* 467 U. S. 20, 32 (1984) (quoting *Procunier* v. *Martinez,* 416 U. S. 396, 413 (1974)).

## IV

As appellants acknowledge, the statutory scheme sustained today "regulates the manner in which publishers

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of the currency which plainly appear spurious." JUSTICE STEVENS' "patient" counterfeiter—trimming numerals, enlarging negatives, and airbrushing borderlines, *post,* at 701, n. 5—would obviously be far better off making photocopies of actual dollar bills than somehow trying to counterfeit money from the negatives used to produce the distorted pictures appearing in appellee's magazines. And, in light of the requirement in § 504(1)(iii) that "the negatives and plates used in making the [permitted] illustrations shall be destroyed after their final use in accordance with this section," it is difficult to see how the Government's interest in preventing access to multiple negatives is further advanced by the color requirement.

Perhaps most significantly, however, the Government does not prohibit color printing generally; therefore, allowing a printer to produce plates that can print only distorted pictures of portions of the currency cannot possibly provide him or his employees with an additional "alibi" for creating plates that can produce realistic facsimiles of currency. Nothing in the statutory scheme upheld today diminishes the ability of a printer with unlawful intentions to create such plates. See 127 Cong. Rec. 17624–17625 (1981) (remarks of Rep. McClory) (Section 504 "was enacted at a time when quality publishing was the domain of comparatively few highly skilled professionals. . . . Quality publishing is [today] by and large in color and no longer an elite technology. With its skills in such wide circulation, a restriction against color reproduction is a burden only on the legitimate, law-abiding printer"). Conversely, the legitimate and compelling Government interest at stake in this case—prevention of the manufacture of illustrations that might plausibly be used for counterfeiting—is fully served by the numerous provisions of Title 18 that make it a crime to make or pass materials that really look like currency. See nn. 10, 25, *supra.*

may depict an item every person sees every day." Brief for Appellants 33, n. 24. As enacted by Congress, this regulation took the form of prohibiting any such depictions unless they were "for philatelic, numismatic, educational, historical, or newsworthy purposes." In an admirable effort to sustain this scheme, JUSTICE STEVENS "construes" that language so that it means essentially nothing: Notwithstanding the "purposes" requirement he purports to uphold, any likeness of the currency is permissible unless it is used for counterfeiting. JUSTICE WHITE, in contrast, acknowledging that the "purposes" language cannot be "saved," offers a new statute that would limit the activities of publishers, whose technical capacity to engage in actual counterfeiting is thereby diminished not one whit, and that would completely ban illustrations by "nonpublishers," who presumably have no such capacity in the first place. The scheme Congress adopted is plainly unconstitutional; the alternative pieces of legislation proposed by JUSTICE WHITE and JUSTICE STEVENS bear little resemblance to the statutes Congress passed.

I do not doubt that a statute can be written that would both satisfy the requirements of the First Amendment and effectively advance the legitimate and important ends Congress sought to achieve in §§474, ¶6, and 504. Today's efforts to draft such a statute have, however, confirmed the wisdom of leaving that task to the Legislative Branch.

I would affirm the judgment of the District Court.

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

I agree with the reasoning and the holding of the Court that the "purposes" requirement contained in § 504 is unconstitutional. I do not agree with the Court's conclusion that "the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable." *Ante*, at 653. As Part II–B(1) of JUSTICE BRENNAN's opinion explains, the plain language and legislative history of § 504 confirm that Congress enacted that provision for the sole purpose of exempting, from the otherwise comprehensive ban on likenesses of the currency, illustrations that serve specifically identified purposes. The "purposes" clause, therefore, is essential to the statutory plan. If that clause is unconstitutional, as the Court, in my view, properly holds, the entire statute is invalid. I agree with JUSTICE BRENNAN that JUSTICE WHITE "errs in simply deleting the crucial statutory language and using the words that remain as the raw materials for a new statute of his own making." *Ante*, at 673.

JUSTICE STEVENS, in his opinion concurring in the judgment in part, advances strong policy arguments in favor of upholding the color and size restrictions. See *post*, at 701–703, and n. 6. Under my view of the case, I do not reach this issue. I note further that one may assume that Congress—if necessary—would move promptly to enact a more carefully drawn statute.

In sum, I believe that the "purposes" clause of § 504(1) is unconstitutional, and that Congress would not have enacted the remaining provisions of § 504 without that clause. I, therefore, simply would invalidate § 504 and affirm the judgment of the District Court without reaching the constitutionality of either the "publication" requirement or the color and size restrictions.

JUSTICE STEVENS, concurring in the judgment in part and dissenting in part.

Time's challenge to the constitutionality of the prohibition against making any likenesses of currency might proceed on either of two quite different theories. First, even if Time's ability to communicate is adequately protected by the rather complex exception for publications that contain pictures complying with color and size limitations, the prohibition against communications that do not come within the exception is so broad—or so poorly defined—that the entire statute is invalid. Second, without considering the potential impact of the statute on third parties, the restrictions are invalid, in whole or in part, as they apply to Time. Given that this statute contains an express exception for expression which may fully accommodate Time's First Amendment rights, I think the Court should begin its analysis by evaluating the impact of the statute on the litigant before the Court before it confronts any question concerning the statute's impact on third parties.

I also think that the Court should decline Time's invitation to plunge right into the constitutional analysis without pausing to determine whether, and to what extent, a fair construction of the statute would protect Time's legitimate interests and also avoid the unnecessary adjudication of constitutional questions. Most of the Treasury Department's criticism of Time's use of pictures of currency—and I believe all of its criticism of black and white reproductions—stemmed from what I regard as an incorrect reading of the word "newsworthy" in § 504(1). Although I recognize that the Government has not been consistent in its reading of that word, any ambiguity could readily have been eliminated by a declaratory judgment construing the term.

Time, however, did not ask the District Court or this Court for a favorable construction of the statute. Instead, as is the current fashion in First Amendment litigation, cf. *United States* v. *Grace*, 461 U. S. 171 (1983), it asks this Court to adopt the most confusing and constitutionally questionable interpretation of the statute that it could in order to fortify its constitutional challenge.

## I

Plainly there is no need to rely on the "overbreadth" doctrine to support Time's standing to challenge the constitutionality of this statute. Time is a publisher of widely circulated news magazines. The record makes it perfectly clear that the statute impairs its ability to communicate with the public by using some illustrations that include small, but colorful reproductions of currency. There can be no doubt concerning appellee's standing to challenge the statute's requirement that pictures of money may not use any color except black and white and must be either less than three-fourths or more than one and a half times the size of actual bills or coins. Time's own First Amendment rights are clearly implicated.

It is clear to me that Time's problems with this statute are not exacerbated in the slightest by the fact that the exception from its blanket prohibition is limited by a "purpose" requirement and a "publications" requirement or, as JUSTICE BRENNAN argues, a single requirement that merges both concepts. Under a proper construction of this provision, any picture of money that Time will disseminate would qualify as "newsworthy"—and thus satisfy the purpose requirement—as well as being contained in a "magazine"—and thus satisfy the publications requirement. Thus, to evaluate the constitutionality of the color and size restrictions as they affect Time, it is wholly unnecessary to consider the significance of either the publications or the purpose requirement for parties who are not before the Court. Cf. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 542–548 (1981) (STEVENS, J., dissenting in part); see also *ante*, at 649–652 (opinion of WHITE, J.). In short, while the statute might not have accommodated adequately the First Amendment rights of all individuals, if it has successfully avoided abridging Time's freedom of speech or press through the exception, Time has no stake in championing the rights of third parties regarding these issues.

## II

When § 474 was adopted, it probably occurred to no one that the statute limited legitimate communication. The post-Civil War Congress that enacted § 474 presumed that anyone printing or photographing likenesses of the currency was up to no good. The use of images of the currency for legitimate, communicative purposes was probably too esoteric to be deemed significant or realistic in the 19th century, and it was of the utmost concern to assure the integrity and value of the greenback—itself under attack on constitutional grounds as being inherently worthless and not suitable as legal tender, see *The Legal Tender Cases*, 12 Wall. 457 (1871) (overruling *Hepburn* v. *Griswold*, 8 Wall. 603 (1870)).

Section 474, to the extent it prohibits expression at all, does so only inadvertently and incidently. The object of §474 is plain and has nothing whatever to do with suppressing dissemination of ideas on the basis of content or anything else. The prohibition plainly is not "aimed at any restraint of freedom of speech . . . ." *Cox* v. *New Hampshire*, 312 U. S. 569, 578 (1941). It dedicates the image Congress selected for our currency to the use for which it is lawfully intended and prohibits all others from making likenesses of that image. Section 474 itself does not turn on the content or subject matter of the message a speaker might wish to convey; it serves a significant governmental interest; and it leaves open alternative channels for communication of the information. It is subject to attack on the grounds that it serves the governmental interest too imprecisely to justify the incidental effect on communication. In short, §474 is a restriction on the manner of expression, and if it would suffer from any constitutional infirmity, presumably it would be on the ground that it is "overbroad."

This provision stood on the books for nearly a century without modification or challenge, but as the decades passed, and the instruments of mass communication multiplied and became more sophisticated, free expression clashed with §474. The familiar image of United States currency became a powerful symbol, to the point of perhaps becoming somewhat of a modern icon. So embedded is the freedom of speech and of the press in our governmental institutions that with no overt suggestion of a constitutional infirmity in §474, the Treasury Department adopted the practice, without evident statutory authority, of making exceptions from the broad prohibition in the interest of free expression on a case-by-case basis.

Section 504 is Congress' attempt to narrow whatever "overbreadth" infects § 474: Congress sought to accommodate the interests in using the symbol of the currency for free expression in the marketplace of ideas. Important as its symbolic value is, however, communication is of course not the primary purpose of the image—its primary purpose is its use in exchange transactions. A core governmental function is implicated in this case, and the compelling nature of the Government's interest is demonstrated by the fact that Art. I, § 8, cl. 6, of the Constitution expressly empowers Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States." The dispute in this case is not over the strength of the governmental interest, but rather the extent to which it is served by the specific provision in question. In my view, however, a statute which implicates a particularly strong governmental interest need not serve that interest to the same degree to withstand constitutional scrutiny as it would if the interest were weaker. Similarly, the effectuation of that interest need not be perfect, or nearly so, if the intrusion on expression is minimal.

Congress' attempt to reconcile the competing interests, and to eliminate possibly impermissible applications of § 474, is entitled to great respect. When Congress legislates exceptions to a general prohibition to accommodate First Amendment interests, we should not adopt a grudging interpretation of the exceptions, but should liberally construe them to effectuate their remedial purposes. Congress adopted the exception in the spirit of the First Amendment; courts should construe them in the same fashion. There is a presumption in favor of the constitutionality of an Act of Congress. See, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981). This presumption should be particularly salient regarding a statutory scheme which on its face goes far in accommodating the interests of free expression at stake in a statutory scheme legitimately directed at a serious substantive evil.

Generally, of course, we construe Acts of Congress to avoid constitutional questions. See, *e. g.*, *United States* v. *Clark*, 445 U. S. 23, 27 (1980). This maxim of construction is not merely based on a desire to avoid premature adjudication of constitutional issues. Like others, the maxim also reflects a judicial presumption concerning the intent of the draftsmen of the language in question. In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties.

In this case, this belief is no mere presumption. Congress recognized, as had the Executive Branch for years, the expressive value of the image of the currency and determined that § 474 undermined such expression, sweeping within its prohibition identifiable, legitimate uses of the image. In § 504, Congress sought to excise the surplusage from the broad prohibition of § 474 to ameliorate the overbreadth of that provision. Appellee does not attack § 504 as overbroad—it argues that it is not broad enough. Stated another way, appellee contends that the impermissible applications of § 474, even with the large exception carved out by § 504, dwarf the permissible applications.

Appellee maintains that Congress failed in its attempt to accommodate First Amendment interests. Specifically, it attacks the purposes requirement and essentially contends that it has a First Amendment right to take color photographs of United States currency so long as the specific pictures it publishes cannot be passed off as the real thing.

## III

### *Purposes Requirement*

The Court devotes little attention to the constitutionality of the purposes requirement, brushing aside this attempt by Congress to reconcile the interest in free expression with respect to images of the currency with the interest in protecting the integrity of that image for its primary purpose. In a paragraph, we are simply told that a determination of newsworthiness or educational value of an image of the currency must be based on the content of the message and that the Government will determine if that message is newsworthy in determining the applicability of the exception. Then the Court makes the sweeping statement that regulations permitting the Government to discriminate on the basis of content are *per se* violative of the First Amendment.[1]

I do not interpret the provision to give the Government a license to determine the newsworthiness or the value of the substantive message being conveyed. Rather, giving it the liberal construction I think it deserves, the question is merely whether the image of the currency is used for such a purpose, or stated another way, whether the image is being used to convey information or express an idea.[2] That requirement is easily met—whenever the image is used in connection with a news article, it necessarily will comply with this condition unless the editor's use of the image bears no rational relationship to the information or idea he is trying to convey.[3] The key point is that he must be attempting to

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[1] The Court makes the following statement: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Ante*, at 648–649. The Court's summary invalidation of the purposes requirement on the basis of this sweeping statement is particularly disturbing in light of the fact that Congress employed quite similar language in striking a similar balance between free expression and a governmental interest under the Copyright Act. Pursuant to the express authority of Art. I, § 8, of the Constitution, Congress established a copyright which generally vests the exclusive right to reproduce original works with the author of the work. 17 U. S. C. § 106. One who infringes that right by reproducing the work, see § 501(a), is subject to criminal prosecution, see § 506. This broad prohibition, however, is qualified. Individuals may make a "fair use" of the copyrighted works "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research . . . ." § 107.

To my knowledge, it has never been seriously suggested that the fair use provision of the Copyright Act is violative of the First Amendment because it allows governmental authorities to make decisions on the basis of content. Indeed, we have recognized the interests in free expression that the fair use provision was intended to serve. See generally *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. 417, 445–446, and n. 27, 450–451, 454–455, and n. 40 (1984). If the broad language of today's opinion were to be applied literally, perhaps this provision would be highly suspect.

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[2] Cf. *Schacht* v. *United States*, 398 U. S. 58, 61–62, n. 3 (1970) (interpreting exception from statute making it a crime for a civilian to wear a United States military uniform for "an actor in a theatrical or motion-picture production" to be applicable to a protester in a dramatic street demonstration).

[3] The legislative history is consistent with my view that Congress, by use of the term "newsworthy," simply intended to exempt pictures of the currency used in connection with articles in publications. The House and Senate Committee Reports, quoted by JUSTICE WHITE, stated that "'[n]ewspapers quite often publish pictures of paper money or checks in connection with news articles,'" *ante*, at 655, n. 10 (citations omitted), and plainly that connection was deemed sufficient by the Congress to invoke the exemption.

Time's analysis of this statement in the legislative history is typical of its approach to this litigation. Incredibly, Time asserts that the need of members of the press to report the news was "[c]uriously absent" from the list of legitimate purposes set forth in the Committee Reports, interpreting the language quoted as a mere passing observation. Brief for Appellee 8, n. 10. Time thus asks this Court to ignore the plain import of the language of the statute and the legislative history—language which was plainly intended to benefit publications such as Time—and actually argues for a construction against its interest.

The history of § 504 makes it rather clear that Congress intended to exempt uses of pictures of money that serve a legitimate purpose and that pose no significant threat of counterfeiting or fraud. The democratic process through which § 504 was crafted resulted in a list, expanded from time to time, of exempted uses largely coterminous with the legitimate uses that actual experience demonstrated were substantial. The fact that § 504 is not still broader is attributable in part to the fact that experience did not demonstrate a substantial need for any other exceptions. This is an apt case for remembering the words of Justice Holmes: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as communicate: he must be using the symbol as expression protected by the First Amendment, and not merely reproducing images of the currency for some noncommunicative purpose, *e. g.*, to facilitate counterfeiting.[4]

### *Color and Size Requirements*

With respect to the cover illustrations contained in the record in this case, it would appear that Time's interest is in reproducing realistic illustrations of the currency, and the more realistic the illustration, the more effective the commu-

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great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267, 270 (1904).

It seems clear to me that a fair interpretation of the scope of § 504 will involve substantially all legitimate uses of reproductions of currency and exclude those that are illegitimate. Moreover, the purpose request itself surely makes sense. If a Treasury agent finds a printer with negatives of currency in his possession, an inquiry is appropriate to determine the purpose those negatives were intended to serve.

JUSTICE BRENNAN is critical of my construction of the "purposes" requirement of § 504 which draws a broad distinction between legitimate and illegitimate uses of reproductions of currency. He seems to think that reading the word "newsworthy" to mean "newsworthy" is "judicial rewriting" and that it "'pervert[s] the purpose'" of § 504 to construe it to exempt legitimate uses that had been called to the attention of Congress or the Treasury Department before it was enacted. See *ante*, at 663–664, n. 1. With all due respect, I suggest that JUSTICE BRENNAN has accepted Time's invitation to plunge headlong into the alluring waters of constitutional analysis. He construes the crucial language in the light most unfavorable to Time with an eye toward a still larger constitutional plum on the horizon—§ 474 itself, which when § 504 is invalidated, is then ironically subject to attack either on overbreadth grounds or inseverability grounds.

[4] However, if the idea to be conveyed is to advocate counterfeiting, *e. g.*, the publication of a counterfeiting manual, and the speech presents a clear and present danger of bringing about that substantive evil, the speech is unprotected under the First Amendment.

Time, it should be noted, expresses no interest in simply printing pictures of money unconnected with any message; and hence we need not decide whether the unadorned photograph of a dollar bill, expressing no other message than "this is a dollar bill," would be covered by the exception.

I should note that because I believe the purposes requirement does not offend the First Amendment, I do not reach any severability issue.

nication. However, the very heart of the Government's interest grows stronger the more realistic the illustration is. Stated another way, Time does not want to use illustrations of the currency which plainly appear spurious; the Government's precise legitimate interest is to permit only those illustrations which do plainly appear spurious. Time notes that one of these pictures may be worth a thousand words; the Government notes one of these pictures or negatives may be worth a thousand dollars.

Time particularly objects to the color requirement—it wants to print pictures of money in its actual color.[5] Time's communicative interest in printing pictures of the currency in color seems weak.[6] We are not told that use of the actual color of the currency expresses an idea itself, aside from communicating information about the color of the currency. But that is not necessary to communicate the substantive ideas Time is attempting to convey, any more than the size of the bill must be communicated by showing its actual size. The use of the bill's actual color adds little if anything to the message, particularly because the currency itself is not especially colorful.

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[5] A color other than the actual color, or one similar to it, might be communicative under some circumstances, but the record does not indicate that Time has any interest in using other colors. Time may argue, however, that the black and white requirement is overbroad on the ground that it is irrational as applied to any color other than a color similar to the actual color of the currency. But the legitimate sweep of the statute dwarfs its arguably impermissible applications because it seems quite plain that ordinarily it is the actual color which would be selected most often. This conclusion is supported not only by the record in this case, but by common sense as well.

Time, it should be noted, argues that in most cases the expressive quality of illustrations of the currency derives principally from artistic interpretation and distortion of the image, and therefore states that "an actual-size, true-color, unembellished picture of a dollar bill . . . is of little use to Time's journalists." Brief for Appellee 3. If that is true, Time seems to be conceding it has little interest in challenging the color and size limitations, or stated another way, the color and size limitations have a *de minimis* impact on its ability to communicate effectively.

[6] The front of United States currency is not very colorful in any event. Aside from the serial numbers and the Seal of the Department of the Treasury, which are a rather vivid green, the rest of the image borders on being black and white itself. The difference between printing a black and white image of it and and color image of it would have a *de minimis* impact on the value of the image for communicative purposes, compare App. 17 (black and white likeness of a thousand dollar bill) with an actual one dollar bill, but would have a significant impact on the value of the image for fraudulent or deceptive purposes. While it may be that only the most gullible

A reproduction which meets the size requirements, to be sure, advances the Government interest in preventing deception, but the color requirement advances the interest as well, in a manner that is independent of the size requirement. Imposing both requirements reduces the likelihood of the evil Congress legitimately desired to prevent to a greater extent than imposing just one of the requirements.

To argue, as does Time, that the color requirement is invalid would invalidate the size requirement as well. Time argues that the color requirement is invalid because some of its covers violate the color requirement and yet "none of them has the remotest capacity for deception or could otherwise be used to make a counterfeit." Brief for Appellee 43. The same argument could be made if the covers violated the size requirement. The reasons Time points to in arguing that its covers pose no real risk as instruments for fraud—such factors as the kind of paper used for its covers, and the fact that images of the bills are partially obscured or distorted—would be equally applicable if Time violated both the color and size requirements. The point is that whatever capacity the covers have as instruments of deception is

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among us—those who might indeed take a proverbial wooden nickel—could possibly be duped into accepting a cutout from a Time magazine cover as the genuine article even if it were the same size and same color as a thousand dollar bill, since it is on a different kind of paper and is printed on only one side, Congress apparently thought that the existence of the negatives and color plates pose a real threat of counterfeiting.

necessarily enhanced if the bill is shown in its actual color, just as it is enhanced if the bill is reproduced in its actual size.

Moreover, Time all but ignores the potential variety of ways in which a negative could be used for illegitimate purposes. The size requirement is meaningless, or always met, with respect to a negative. The point, of course, is that a negative that makes a print meeting the size requirement can also make a print the exact size of a bill. If it is a black and white negative, all that can be produced is a black and white reproduction of the bill; if it is a color negative, a color reproduction may be made. The fact that the bill is partially obscured in the photographs or even in the negatives is not dispositive; the statute prohibits making color photographs of even parts of bills for a reason.[7]

The statute at issue in this case is but one part of a comprehensive scheme to be sure; but that cannot render it susceptible to invalidation on the ground that the other portions of the scheme largely meet the governmental interest. The fact that there are other statutes available to punish counterfeiters does not negate the Government's interest here; Congress may provide "alternative statutory avenues of prosecution to assure the effective protection of one and the same interest." *United States* v. *O'Brien*, 391 U. S. 367, 380

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[7] If the numerals on the bill are not obscured, for example, a color negative of that bill could be used to reproduce copies of those numerals in the correct size and in color on paper resembling that used in real currency and then affixed to a lower denomination bill, airbrushing the borderlines to complete the deceptive instrument. Moreover, it is no answer to say that for any given photograph used in preparing any given cover, all of the corners are not shown, as they are, for example, in the hundred dollar bills shown in Exhibit F to the complaint, App. 23. All of the numerals may not be necessary for perpetrating a fraud; and the patient counterfeiter or con-artist in the printshop may bide his time, making prints from the negatives as they become available. It is no answer to say that the criminal would do better to take his own color photographs, see *ante*, at 688–690, n. 27, for in doing so he would be violating this statute.

(1968). This statute protects the gullible as well as the shrewd, and the Government need not wait until near perfect forgeries are rolling off the presses to act.

In conclusion, this statute is one weapon in an arsenal designed to deprive would-be counterfeiters and defrauders of the tools of deception and, given the strength of the state interest and the presumption of constitutionality which attaches to an Act of Congress, I believe the color and size requirements are permissible methods of minimizing the risk of fraud as well as counterfeiting, and can have only a minimal impact on Time's ability to communicate effectively.

It may well be, as Time argues, that "Congress can do a much better job in preventing counterfeiting than the present § 474 and § 504," Brief for Appellee 46. The question for us, of course, is not whether Congress could have done a better job, but whether the job it did violates Time's right to free expression. It does not: Time is free to publish the symbol it wishes to publish and to express the messages it wishes to convey by use of that symbol; it merely must comply with restrictions on the manner of printing that symbol which are reasonably related to the strong governmental interests in preventing counterfeiting and deceptive uses of likenesses of the currency.

Accordingly, I concur in the judgment of the Court in part, and dissent in part.

# UNITED STATES *v.* KARO ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83-850. Argued April 25, 1984—Decided July 3, 1984

After a Drug Enforcement Administration (DEA) agent learned that respondents Karo, Horton, and Harley had ordered 50 gallons of ether from a Government informant, who had told the agent that the ether was to be used to extract cocaine from clothing that had been imported into the United States, the Government obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. With the informant's consent, DEA agents substituted their own can containing a beeper for one of the cans in the shipment. Thereafter, agents saw Karo pick up the ether from the informant, followed Karo to his house, and determined by using the beeper that the ether was inside the house where it was then monitored. The ether then moved in succession to two other houses, including Horton's, before it was moved first to a locker in one commercial storage facility and then to a locker in another such facility. Both lockers were rented jointly by Horton and Harley. Finally, the ether was removed from the second storage facility by respondent Rhodes and an unidentified woman and transported in Horton's truck, first to Rhodes' house and then to a house rented by Horton, Harley, and respondent Steele. Using the beeper monitor, agents determined that the beeper can was inside the house, and obtained a warrant to search the house based in part on information derived through use of the beeper. The warrant was executed and Horton, Harley, Steele, and respondent Roth were arrested, and cocaine was seized. Respondents were indicted for various offenses relating to the cocaine. The District Court granted respondents' pretrial motion to suppress the seized evidence on the grounds that the initial warrant to install the beeper was invalid and that the seizure was the tainted fruit of an unauthorized installation and monitoring of the beeper. The Government appealed but did not challenge the invalidation of the initial warrant. The Court of Appeals affirmed, except with respect to Rhodes, holding that a warrant was required to install the beeper in the can of ether and to monitor it in private dwellings and storage lockers, that the warrant for the search of the house rented by Horton, Harley, and Steele, and the resulting seizure were tainted by the Government's prior illegal conduct, and that therefore the evidence was properly suppressed as to Horton, Harley, Steele, Roth, and Karo.

*Held:*

1. No Fourth Amendment interest of Karo or of any other respondent was infringed by the installation of the beeper. The informant's consent was sufficient to validate the installation. And the transfer of the beeper-laden can to Karo was neither a search nor a seizure, since it conveyed no information that Karo wished to keep private and did not interfere with anyone's possessory interest in a meaningful way. Pp. 711–713.

2. The monitoring of a beeper in a private residence, a location not opened to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence. Here, if a DEA agent had entered the house in question without a warrant to verify that the ether was in the house, he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. The result is the same where, without a warrant, the Government surreptitiously uses a beeper to obtain information that it could not have obtained from outside the curtilage of the house. There is no reason in this case to deviate from the general rule that a search of a house should be conducted pursuant to a warrant. Pp. 713–718.

3. The evidence seized in the house in question, however, should not have been suppressed with respect to any of the respondents. The information that the ether was in the house, verified by use of the beeper without a warrant, would be inadmissible against those respondents with privacy interests in the house and would invalidate the search warrant, if critical to establishing probable cause. But because locating, without prior monitoring, the ether in the second storage facility was not an illegal search (use of the beeper not identifying the specific locker in which the ether was located and the locker being identified only by the smell of ether emanating therefrom) and because the ether was seen being loaded into Horton's truck, which then traveled the highways, it is evident that there was no violation of the Fourth Amendment as to anyone with or without standing to complain about monitoring the beeper while it was located in the truck. *United States* v. *Knotts*, 460 U. S. 276. Under the circumstances, the warrant affidavit, after striking the facts about monitoring the beeper while it was in the searched house, contained sufficient untainted information to furnish probable cause for issuance of the search warrant. Pp. 719–721.

710 F. 2d 1433, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN and POWELL, JJ., joined, in Parts I, II, and IV of which REHNQUIST and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which

REHNQUIST, J., joined, *post,* p. 721. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 728.

*Deputy Solicitor General Frey* argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Trott, Elliott Schulder,* and *Vincent L. Gambale.*

*Charles Louis Roberts* argued the cause for respondents. With him on the brief for respondents Harley et al. were *Joseph (Sib) Abraham, Jr.,* and *Michael Vigil. Reber Boult, Nancy Hollander,* and *James Beam* filed a brief for respondents Karo et al. *Roger Bargas,* by appointment of the Court, 465 U. S. 1064, filed a brief for respondent Rhodes.*

JUSTICE WHITE delivered the opinion of the Court.

In *United States* v. *Knotts,* 460 U. S. 276 (1983), we held that the warrantless monitoring of an electronic tracking device ("beeper")[1] inside a container of chemicals did not violate the Fourth Amendment when it revealed no information that could not have been obtained through visual surveillance. In this case, we are called upon to address two questions left unresolved in *Knotts:* (1) whether installation of a beeper in a container of chemicals with the consent of the original owner constitutes a search or seizure within the meaning of the Fourth Amendment when the container is delivered to a buyer having no knowledge of the presence of the beeper, and (2) whether monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance.

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**Gerald H. Goldstein* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

[1] "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *United States* v. *Knotts,* 460 U. S., at 277.

## I

In August 1980 Agent Rottinger of the Drug Enforcement Administration (DEA) learned that respondents James Karo, Richard Horton, and William Harley had ordered 50 gallons of ether from Government informant Carl Muehlenweg of Graphic Photo Design in Albuquerque, N. M. Muehlenweg told Rottinger that the ether was to be used to extract cocaine from clothing that had been imported into the United States. The Government obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. With Muehlenweg's consent, agents substituted their own can containing a beeper for one of the cans in the shipment and then had all 10 cans painted to give them a uniform appearance.

On September 20, 1980, agents saw Karo pick up the ether from Muehlenweg. They then followed Karo to his house using visual and beeper surveillance. At one point later that day, agents determined by using the beeper that the ether was still inside the house, but they later determined that it had been moved undetected to Horton's house, where they located it using the beeper. Agent Rottinger could smell the ether from the public sidewalk near Horton's residence. Two days later, agents discovered that the ether had once again been moved, and, using the beeper, they located it at the residence of Horton's father. The next day, the beeper was no longer transmitting from Horton's father's house, and agents traced the beeper to a commercial storage facility.

Because the beeper equipment was not sensitive enough to allow agents to learn precisely which locker the ether was in, agents obtained a subpoena for the records of the storage company and learned that locker 143 had been rented by Horton. Using the beeper, agents confirmed that the ether was indeed in one of the lockers in the row containing locker 143, and using their noses they detected the odor of ether emanating from locker 143. On October 8 agents obtained an order authorizing installation of an entry tone alarm into the door jamb of the locker so they would be able to tell when the door was opened. While installing the alarm, agents observed that the cans containing ether were still inside. Agents ceased visual and beeper surveillance, relying instead on the entry tone alarm. However, on October 16 Horton retrieved the contents from the locker without sounding the alarm. Agents did not learn of the entry until the manager of the storage facility notified them that Horton had been there.

Using the beeper, agents traced the beeper can to another self-storage facility three days later. Agents detected the smell of ether coming from locker 15 and learned from the manager that Horton and Harley had rented that locker using an alias the same day that the ether had been removed from the first storage facility. The agents obtained an order authorizing the installation of an entry tone alarm in locker 15, but instead of installing that alarm, they obtained consent from the manager of the facility to install a closed-circuit video camera in a locker that had a view of locker 15. On February 6, 1981, agents observed, by means of the video camera, Gene Rhodes and an unidentified woman removing the cans from the locker and loading them onto the rear bed of Horton's pickup truck. Using both visual and beeper surveillance agents tracked the truck to Rhodes' residence where it was parked in the driveway. Agents then observed Rhodes and a woman bringing boxes and other items from inside the house and loading the items into the trunk of an automobile. Agents did not see any cans being transferred from the pickup.

At about 6 p. m. on February 6, the car and the pickup left the driveway and traveled along public highways to Taos. During the trip, the two vehicles were under both physical and electronic surveillance. When the vehicles arrived at a house in Taos rented by Horton, Harley, and Michael Steele, the agents did not maintain tight surveillance for fear of detection. When the vehicles left the Taos residence, agents determined, using the beeper monitor, that the beeper can was still inside the house. Again on February 7, the beeper revealed that the ether can was still on the premises. At one point, agents noticed that the windows of the house were wide open on a cold windy day, leading them to suspect that the ether was being used. On February 8, the agents applied for and obtained a warrant to search the Taos residence based in part on information derived through use of the beeper. The warrant was executed on February 10, 1981, and Horton, Harley, Steele, and Evan Roth were arrested, and cocaine and laboratory equipment were seized.

Respondents Karo, Horton, Harley, Steele, and Roth were indicted for conspiring to possess cocaine with intent to distribute it and with the underlying offense. 21 U. S. C. §§ 841(a)(1) and 846. Respondent Rhodes was indicted only for conspiracy to possess. The District Court granted respondents' pretrial motion to suppress the evidence seized from the Taos residence on the grounds that the initial warrant to install the beeper was invalid and that the Taos seizure was the tainted fruit of an unauthorized installation and monitoring of that beeper. The United States appealed but did not challenge the invalidation of the initial warrant. The Court of Appeals affirmed, except with respect to Rhodes, holding that a warrant was required to install the beeper in one of the 10 cans of ether and to monitor it in private dwellings and storage lockers. 710 F. 2d 1433 (CA10 1983). The warrant for the search in Taos and the resulting seizure were tainted by the prior illegal conduct of the Government. The evidence was therefore properly suppressed with respect to respondents Horton, Harley, Steele, and Roth, who were held to have protectible interests in the privacy of the Taos dwelling, and with respect to respondent Karo because the beeper had been installed without a warrant and had been monitored while its ether-can host was in his house.[2] We granted the Government's petition for certiorari, 464 U. S. 1068 (1984), which raised the question whether a warrant was required to authorize either the installation of the beeper or its subsequent monitoring. We deal with each contention in turn.

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[2] The Court of Appeals reversed as to Rhodes since he had not shown that the beeper had been located in any place in which he had a reasonable

## II

Because the judgment below in favor of Karo rested in major part on the conclusion that the installation violated his Fourth Amendment rights and that any information obtained from monitoring the beeper was tainted by the initial illegality, we must deal with the legality of the warrantless installation. It is clear that the actual placement of the beeper into the can violated no one's Fourth Amendment rights. The can into which the beeper was placed belonged at the time to the DEA, and by no stretch of the imagination could it be said that respondents then had any legitimate expectation of privacy in it. The ether and the original 10 cans, on the other hand, belonged to, and were in the possession of, Muehlenweg, who had given his consent to any invasion of those items that occurred. Thus, even if there had been no substitution of cans and the agents had placed the beeper into one of the original 10 cans, Muehlenweg's consent was sufficient to validate the placement of the beeper in the can. See *United States* v. *Matlock*, 415 U. S. 164 (1974); *Frazier* v. *Cupp*, 394 U. S. 731 (1969).

The Court of Appeals acknowledged that before Karo took control of the ether "the DEA and Muehlenweg presumably could do with the can and ether whatever they liked without violating Karo's rights." 710 F. 2d, at 1438. It did not hold that the actual placement of the beeper into the ether can violated the Fourth Amendment. Instead, it held that the violation occurred at the time the beeper-laden can was transferred to Karo. The court stated:

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expectation of privacy, nor had he shown any possessory interest in the ether itself that would have been invaded by the installation of the beeper.

> "All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned." *Ibid.*

Not surprisingly, the Court of Appeals did not describe the transfer as either a "search" or a "seizure," for plainly it is neither. A "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v. *Jacobsen,* 466 U. S. 109, 113 (1984). The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest. It conveyed no information that Karo wished to keep private, for it conveyed no information at all. To be sure, it created a *potential* for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment. A holding to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on. It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.

We likewise do not believe that the transfer of the container constituted a seizure. A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Ibid.* Although the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way. At most, there was a technical trespass on the space occupied by the beeper. The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation. Compare *Katz* v. *United States*, 389 U. S. 347 (1967) (no trespass, but Fourth Amendment violation), with *Oliver* v. *United States*, 466 U. S. 170 (1984) (trespass, but no Fourth Amendment violation). Of course, if the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment.

We conclude that no Fourth Amendment interest of Karo or of any other respondent was infringed by the installation of the beeper. Rather, any impairment of their privacy interests that may have occurred was occasioned by the monitoring of the beeper.[3]

## III

In *United States* v. *Knotts*, 460 U. S. 276 (1983), law enforcement officials, with the consent of the seller, installed a beeper in a 5-gallon can of chloroform and monitored the beeper after delivery of the can to the buyer in Minneapolis, Minn. Although there was partial visual surveillance as the automobile containing the can moved along the public highways, the beeper enabled the officers to locate the can in the area of a cabin near Shell Lake, Wis., and it was this information that provided the basis for the issuance of a search warrant. As the case came to us, the installation of the beeper was not challenged; only the monitoring was at issue. The Court held that since the movements of the automobile and the arrival of the can containing the beeper in the area of the cabin could have been observed by the naked eye, no Fourth Amendment violation was committed by monitoring the beeper during the trip to the cabin. In *Knotts*, the record did not show that the beeper was monitored while the can containing it was inside the cabin, and we therefore had no occasion to consider whether a constitutional violation would have occurred had the fact been otherwise.

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[3] Despite this holding, warrants for the installation and monitoring of a beeper will obviously be desirable since it may be useful, even critical, to monitor the beeper to determine that it is actually located in a place not open to visual surveillance. As will be evident below, such monitoring without a warrant may violate the Fourth Amendment.

Here, there is no gainsaying that the beeper was used to locate the ether in a specific house in Taos, N. M., and that that information was in turn used to secure a warrant for the search of the house. The affidavit supporting the application for a search warrant recited that the ether arrived at the residence in a motor vehicle that later departed and that:

> "For fear of detection, we did not maintain tight surveillance of the residence. . . . Using the 'beeper' locator, I positively determined that the 'beeper' can (5-gallon can of ether, described earlier in this affidavit) was now inside the above-described premises to be searched because the 'beeper' locator (direction finder) pinpointed the beeper signal as emanating from the above-described premises. . . . Again, later on Saturday (now in the daytime), 7 February 1981, my 'beeper' locator still shows a strong 'beeper' signal emanating from inside the above-described residence." App. 57–58.

This case thus presents the question whether the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence. Contrary to the submission of the United States, we think that it does.

At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. *Welsh* v. *Wisconsin*, 466 U. S. 740, 748–749 (1984); *Steagald* v. *United States*, 451 U. S. 204, 211–212 (1981); *Payton* v. *New York*, 445 U. S. 573, 586 (1980). In this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched. Even if visual surveillance has revealed that the article to which the beeper is attached has entered the house, the later monitoring not only verifies the officers' observations but also establishes that the article remains on the premises. Here, for example, the beeper was monitored for a significant period after the arrival of the ether in Taos and before the application for a warrant to search.

The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The case is thus not like *Knotts*, for there the beeper told the authorities nothing about the interior of Knotts' cabin. The information obtained in *Knotts* was "voluntarily conveyed to anyone who wanted to look . . . ," 460 U. S., at 281; here, as we have said, the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified.

We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.[4]

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[4] JUSTICE O'CONNOR observes that a homeowner has no reasonable expectation that a person invited into his home will not be wired with a microphone that transmits conversations in which he engages, see *United States* v. *White*, 401 U. S. 745 (1971), and from this proposition she concludes that a homeowner has no reasonable expectation that an invitee will not bring an object containing a beeper into his home. *Post*, at 722–724. While that observation would be relevant if one of the conspirators in this case had consented to the placement of the beeper in the can, it has no relevance to the case at hand. Surely if the Government surreptitiously plants a listening device on an unsuspecting household guest or family member and then monitors conversations with the homeowner, the homeowner could challenge the monitoring of the conversations regardless of the fact that he did not have power "to give effective consent to the search" of the visitor. *Post*, at 724. As the plurality recognized in *United States* v. *White*, *supra*, at 749, there is a substantial distinction between "revelation[s] to the Government by a party to conversations with the defendant" and eavesdropping on conversations without the knowledge or consent of either party to it. A homeowner takes the risk that his guest will cooperate with the Government but not the risk that a trustworthy friend has been bugged by the Government without his knowledge or consent. Under JUSTICE O'CONNOR's view it could easily be said that in *Katz* v. *United States*, 389 U. S. 347 (1967), Katz had no reasonable expectation of privacy in his conversation because the person to whom he was speaking might have divulged the contents of the conversation. There would be nothing left of the Fourth Amendment right to privacy if anything that a *hypothetical* government informant *might* reveal is stripped of constitutional protection.

*Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), is simply inapposite, since it was not Rawlings' home in which the challenged search occurred. Cf. *Alderman* v. *United States*, 394 U. S. 165 (1969) (homeowner has standing to

We also reject the Government's contention that it should be able to monitor beepers in private residences without a warrant if there is the requisite justification in the facts for believing that a crime is being or will be committed and that monitoring the beeper wherever it goes is likely to produce evidence of criminal activity. Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule. See, *e. g.*, *United States* v. *Ross*, 456 U. S. 798 (1982) (automobiles); *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973) (consent); *Warden* v. *Hayden*, 387 U. S. 294 (1967) (exigent circumstances). The Government's contention that warrantless beeper searches should be deemed reasonable is based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant. The Government argues that the traditional justifications for the warrant requirement are inapplicable in beeper cases, but to a large extent that argument is based upon the contention, rejected above, that the beeper constitutes only a minuscule intrusion on protected privacy interests. The primary reason for the warrant requirement is to interpose a "neutral and detached magistrate" between the citizen and "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). Those suspected of drug offenses are no less entitled to that protection than those suspected of nondrug offenses. Requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search. This is not to say that there

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challenge illegal search of house even if he has no interest in the property seized). JUSTICE O'CONNOR seems to recognize as much, noting in the discussion of *Katz*, *post*, at 725, that "a third person, *who never used a particular telephone line*" would have no standing to challenge illegal eavesdropping. If the phone line is that of the third person, however, a different analysis is involved.

are no exceptions to the warrant rule, because if truly exigent circumstances exist no warrant is required under general Fourth Amendment principles.

If agents are required to obtain warrants prior to monitoring a beeper when it has been withdrawn from public view, the Government argues, for all practical purposes they will be forced to obtain warrants in every case in which they seek to use a beeper, because they have no way of knowing in advance whether the beeper will be transmitting its signals from inside private premises. The argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement. It is worthy of note that, in any event, this is not a particularly attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained in this case, seemingly on probable cause.

We are also unpersuaded by the argument that a warrant should not be required because of the difficulty in satisfying the particularity requirement of the Fourth Amendment. The Government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. Brief for United States 42. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance.

In sum, we discern no reason for deviating from the general rule that a search of a house should be conducted pursuant to a warrant.[5]

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[5] The United States insists that if beeper monitoring is deemed a search, a showing of reasonable suspicion rather than probable cause

## IV

As we have said, by maintaining the beeper the agents verified that the ether was actually located in the Taos house and that it remained there while the warrant was sought. This information was obtained without a warrant and would therefore be inadmissible at trial against those with privacy interests in the house—Horton, Harley, Steele, and Roth. That information, which was included in the warrant affidavit, would also invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid. *Franks* v. *Delaware*, 438 U. S. 154, 172 (1978).

It requires only a casual examination of the warrant affidavit, which in relevant respects consists of undisputed factual assertions, to conclude that the officers could have secured the warrant without relying on the beeper to locate the ether in the house sought to be searched. The affidavit recounted the months-long tracking of the evidence, including the visual and beeper surveillance of Horton's pickup on its trip from Albuquerque to the immediate vicinity of the Taos residence; its departure a short time later without the ether; its later return to the residence; and the visual observation of the residence with its windows open on a cold night.

That leaves the question whether any part of this additional information contained in the warrant affidavit was itself the fruit of a Fourth Amendment violation to which any of the occupants of the house could object. As far as the

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should suffice for its execution. That issue, however, is not before us. The initial warrant was not invalidated for want of probable cause, which plainly existed, but for misleading statements in the affidavit. The Government did not appeal the invalidation of the warrant and as the case has turned out, the Government prevails without a warrant authorizing installation. It will be time enough to resolve the probable cause-reasonable suspicion issue in a case that requires it.

present record reveals, two of the four respondents who had standing to object to the search of the residence—Steele and Roth—had no interest in any of the arguably private places in which the beeper was monitored prior to its arrival in Taos. The evidence seized in the house would be admissible against them.

The question as to Horton and Harley is somewhat more complicated. On the initial leg of its journey, the ether came to rest in Karo's house where it was monitored; it then moved in succession to two other houses, including Horton's, before it was moved first to a locker in one public warehouse and then to a locker in another. Both lockers were rented jointly by Horton and Harley. On September 6, the ether was removed from the second storage facility and transported to Taos.

Assuming for present purposes that prior to its arrival at the second warehouse the beeper was illegally used to locate the ether in a house or other place in which Horton or Harley had a justifiable claim to privacy, we are confident that such use of the beeper does not taint its later use in locating the ether and tracking it to Taos. The movement of the ether from the first warehouse was undetected, but by monitoring the beeper the agents discovered that it had been moved to the second storage facility. No prior monitoring of the beeper contributed to this discovery; using the beeper for this purpose was thus untainted by any possible prior illegality. Furthermore, the beeper informed the agents only that the ether was somewhere in the warehouse; it did not identify the specific locker in which the ether was located. Monitoring the beeper revealed nothing about the contents of the locker that Horton and Harley had rented and hence was not a search of that locker.[6] The locker was identified only when agents traversing the public parts of the facility found that the smell of ether was coming from a specific locker.

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[6] Had the monitoring disclosed the presence of the container within a particular locker the result would be otherwise, for surely Horton and Harley had a reasonable expectation of privacy in their own storage locker.

The agents set up visual surveillance of that locker, and on September 6, they observed Rhodes and a female remove the ether and load it into Horton's pickup truck. The truck moved over the public streets and was tracked by beeper to Rhodes' house, where it was temporarily parked. At about 6 p. m. the truck was observed departing and was tracked visually and by beeper to the vicinity of the house in Taos. Because locating the ether in the warehouse was not an illegal search—and because the ether was seen being loaded into Horton's truck, which then traveled the public highways—it is evident that under *Knotts* there was no violation of the Fourth Amendment as to anyone with or without standing to complain about monitoring the beeper while it was located in Horton's truck. Under these circumstances, it is clear that the warrant affidavit, after striking the facts about monitoring the beeper while it was in the Taos residence, contained sufficient untainted information to furnish probable cause for the issuance of the search warrant. The evidence seized in the house should not have been suppressed with respect to any of the respondents.[7]

The judgment of the Court of Appeals is accordingly

*Reversed.*

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join Parts I, II, and IV of the Court's opinion, and agree with substantial portions of Part III as well.

I agree with the Court that the installation of a beeper in a container with the consent of the container's present owner implicates no Fourth Amendment concerns. The subsequent transfer of the container, with the unactivated beeper, to one who is unaware of the beeper's presence is also unobjectionable. It is when the beeper is activated to track the movements of the container that privacy interests are implicated.

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[7] Although the unwarranted monitoring of the beeper in Karo's house would foreclose using that evidence against him, it did not taint the discovery of the ether in the second warehouse and the ensuing surveillance of the trip to Taos.

In my view, however, these privacy interests are unusually narrow—narrower than is suggested by the Court in Part III of its opinion. If the container is moved on the public highways, or in other places where the container's owner has no reasonable expectation that its movements will not be tracked without his consent, activation of the beeper infringes on no reasonable expectation of privacy. *United States* v. *Knotts*, 460 U. S. 276 (1983). In this situation the location of the container defeats any expectation that its movements will not be tracked.

In addition, one who lacks ownership of the container itself or the power to move the container at will, can have no reasonable expectation that the movements of the container will not be tracked by a beeper within the container, regardless of where the container is moved. In this situation the absence of an appropriate interest in the container itself defeats any expectation of privacy in the movements of the container, even when the container is brought into places where others may have a privacy interest. Cf. *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980); *United States* v. *White*, 401 U. S. 745 (1971); *Lopez* v. *United States*, 373 U. S. 427 (1963).

## I

As a threshold matter it is clear that the mere presence of electronic equipment inside a home, transmitting information to government agents outside, does not, in and of itself, infringe on legitimate expectations of privacy of all who have an expectation of privacy in the home itself. For example, *United States* v. *White*, *supra*, permitted the use of information obtained from within a home by means of a microphone secreted on a Government agent. We must therefore look for something more before concluding that monitoring of a beeper in a closed container that is brought into a home violates the homeowner's reasonable expectations of privacy.

The Court holds that the crucial additional factor is the container owner's consent, or lack of consent, to the installation of the beeper. If consent is given, movement of the container into the home violates no reasonable expectation of privacy of the homeowner. If the container owner's consent is not obtained, the Court holds that the homeowner's expectations of privacy in the home are violated when the beeper enters and is monitored from inside the home, even if the homeowner has no interest or expectation of privacy in the container itself. In my view this analysis is somewhat flawed.

First, the test proposed by the Court seems squarely inconsistent with *Rawlings* v. *Kentucky, supra.* In *Rawlings* this Court approved the admission of drugs seized from a woman's purse because her male companion did not prove that he had a legitimate expectation of privacy in the purse. Indeed, the male companion lacked standing to challenge the search even though he claimed ownership of the drugs found in the purse. Had the purse contained a beeper that for some reason was itself evidence of a crime, only the owner of the purse, not her companion, could have objected to the admission of the beeper itself as evidence. A search of a closed container that occurs without the consent of the container's owner does not give to every defendant a right to suppress incriminating evidence found in the container.

The Court's test for when monitoring a beeper inside a guest's closed and private container violates a homeowner's expectations of privacy is, moreover, difficult to reconcile with *United States* v. *Matlock,* 415 U. S. 164 (1974), and many other similar decisions that address expectations of privacy in closed containers. A homeowner who entirely lacks access to or control over a guest's closed container would presumably lack the power to consent to its search under the standards articulated by this Court in *United States* v.

*Matlock, supra.* But surely a homeowner cannot simultaneously have so little interest in a container that his consent to its search is constitutionally ineffective, and have so great an interest in the container that its search violates his constitutional rights. Standing to object to the search of a container, and power to give effective consent to the search, should go hand in hand.

Finally, and most fundamentally, it is difficult to see how a homeowner's expectations of privacy can depend in any way on an invitee's actual status as a government informant. Expectations are formed on the basis of objective appearances, not on the basis of facts known only to others. Stated another way, the homeowner's expectation that a container does not contain a beeper cannot depend on the container owner's belief that the container is beeper-free. The homeowner's expectation of privacy is either inherently reasonable or it is inherently unreasonable. A guest's undisclosed status as a government informant cannot alter the reasonableness of that expectation.

## II

I would, therefore, use a different and generally narrower test than the one proposed by the Court for determining when an activated beeper in a closed container violates the privacy of a homeowner into whose home the container is moved. I would use as the touchstone the defendant's interest in the container in which the beeper is placed. When a closed container is moved by permission into a home, the homeowner and others with an expectation of privacy in the home itself surrender any expectation of privacy they might otherwise retain in the movements of the container—unless it is *their* container or under *their* dominion and control.[1]

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[1] If a container is moved into a home *without* permission, the homeowner of course retains a legitimate expectation that the container will not enter into his home, and *a fortiori* a legitimate expectation that knowledge of the

My reasons for preferring this approach require some elaboration. The principles for assessing a single person's privacy interests in a particular place, location, or transmission system such as a telephone line, are reasonably well settled. The Court relies on these principles—particularly on the strong presumption of privacy in the home—to analyze the beeper case presented here. But the movement of a guest's closed container into another's home involves overlapping privacy interests. When privacy interests in particular locations are shared by several persons, assessing expectations of privacy requires a more probing analysis.

A privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home. This has been recognized before in connection with third-party consent to searches. A homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home. Consent to search a container or a place is effective only when given by one with "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States* v. *Matlock*, 415 U. S., at 171. "Common authority . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes . . . ." *Id.*, at 171, n. 7.

When a person has no privacy interest whatsoever in a particular container, place, or conversation, as in *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), Fourth Amendment analysis is straightforward—the person lacks standing to suppress the evidence obtained pursuant to an unlawful search of the place, or unlawful monitoring of the conversation. Thus, a third person, who never used a particular telephone line, could not suppress, at least on Fourth Amendment grounds,

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container's location inside his home will not be broadcast to the world outside.

evidence obtained by an unlawful wiretap of conversations between two other persons.[2]

Another relatively easy case arises when two persons share identical, overlapping privacy interests in a particular place, container, or conversation. Here *both* share the power to surrender each other's privacy to a third party. Persons who share access to closed containers also share the power to consent to a search; only if neither consents do both retain the right to object to the fruits of an unlawful search. Similarly, two people who speak face to face in a private place or on a private telephone line both may share an expectation that the conversation will remain private, *Katz* v. *United States*, 389 U. S. 347 (1967), but either may give effective consent to a wiretap or other electronic surveillance, *United States* v. *White*, 401 U. S. 745 (1971). One might say that the telephone line, or simply the space that separates two persons in conversation, is their jointly owned "container." Each has standing to challenge the use as evidence of the fruits of an unauthorized search of that "container," but either may also give effective consent to the search.

A more difficult case arises when one person's privacy interests fall *within* another's, as when a guest in a private home has a private container to which the homeowner has no right of access. The homeowner who permits entry into his home of such a container effectively surrenders a segment of the privacy of his home to the privacy of the owner of the container. Insofar as it may be possible to search the container without searching the home, the homeowner suffers no invasion of *his* privacy when such a search occurs; the homeowner also lacks the power to give effective consent to the search of the closed container. For example, evidence obtained from an electronic device in the container that transmitted information only about the *contents* of the container could not be suppressed by the homeowner unless he also had a privacy interest in the container, even if the information were transmitted from inside the home.

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[2] But see 18 U. S. C. § 2515 (broader standing rules to suppress wiretap evidence set by statute).

The beeper in this case, however, transmitted information about the *location*, not the contents, of the container. Conceivably, location in a home is an attribute partly of the home and partly of the container itself. But the primary privacy interest is not the homeowner's. By giving consent to another to move a closed container into and out of the home the homeowner has effectively surrendered his privacy insofar as the location of the container may be concerned, or so we should assume absent evidence to the contrary. In other words, one who lacks dominion and control over the object's location has no privacy interest invaded when that information is disclosed. It is simply not *his* secret that the beeper is disclosing, just as it is not *his* privacy that would be invaded by a search of the container whose contents he did not control.

## III

In sum, a privacy interest in the location of a closed container that enters a home with the homeowner's permission cannot be inferred mechanically by reference to the more general privacy interests in the home itself. The homeowner's privacy interests are often narrower than those of the owner of the container. A defendant should be allowed to challenge evidence obtained by monitoring a beeper installed in a closed container only if (1) the beeper was monitored when visual tracking of the container was not possible, so that the defendant had a reasonable expectation that the container's movements would remain private, and (2) the defendant had an interest in the container itself sufficient to empower him to give effective consent to a search of the container. A person's right not to have a container tracked by means of a beeper depends both on his power to prevent visual observation of the container and on his power to control its location, a power that can usually be inferred from a privacy interest in the container itself. One who lacks either power has no legitimate expectation of privacy in the movements of the container.

For the reasons stated in Part IV of JUSTICE WHITE's opinion, I agree that the decision below must be reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

The beeper is a species of radio transmitter. Mounted inside a container, it has much in common with a microphone mounted on a person. It reveals the location of the item to which it is attached—the functional equivalent of a radio transmission saying "Now I am at ——."

The threshold question in this case is whether the beeper invaded any interest protected by the Fourth Amendment. As we wrote earlier this Term, the Fourth Amendment

> "protects two kinds of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984) (footnotes omitted).

In my opinion the surreptitious use of a radio transmitter—whether it contains a microphone or merely a signalling device—on an individual's personal property is both a seizure and a search within the meaning of the Fourth Amendment. Part III of the opinion of the Court correctly concludes that when beeper surveillance reveals the location of property that has been concealed from public view, it constitutes a "search" within the meaning of the Fourth Amendment. I join Part III on that understanding. However, I find it necessary to write separately because I believe the Fourth Amendment's reach is somewhat broader than that which is explicitly acknowledged by the Court, and in particular because my understanding of the Fourth Amendment, as well as my understanding of the issues that have been framed for us by the parties to this case, leads me to a different result than that reached by the Court.

## I

The attachment of the beeper, in my judgment, constituted a "seizure."[1] The owner of property, of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely such an invasion is an "interference" with possessory rights; the right to exclude, which attached as soon as the can respondents purchased was delivered, had been infringed.[2] That interference is also "meaningful"; the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free.

The impact on possessory rights of this type of governmental conduct is illustrated by *Silverman* v. *United States*, 365 U. S. 505 (1961). There the Court held that the attachment of a microphone to the heating duct of an apartment building in order to eavesdrop on conversations in a nearby apartment implicated the Fourth Amendment:

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[1] The seizure issue was not decided in *United States* v. *Knotts*, 460 U. S. 276 (1983); there Knotts did not challenge the installation of the beeper or its impact on his possessory rights. See *id.*, at 279, n.; see also *id.*, at 286 (BRENNAN, J., concurring in judgment); *id.*, at 288 (STEVENS, J., concurring in judgment).

[2] It makes no difference in this case that when the beeper was initially attached, the can had not yet been delivered to respondents. Once the delivery had been effected, the container was respondents' property from which they had the right to exclude all the world. It was at that point that the infringement of this constitutionally protected interest began.

> "[T]he officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law." *Id.*, at 511 (footnote omitted).

Here too, by attaching a monitoring device to respondents' property, the agents usurped a part of a citizen's property—in this case a part of respondents' exclusionary rights in their tangible personal property. By attaching the beeper and using the container to conceal it, the Government in the most fundamental sense was asserting "dominion and control" over the property—the power to use the property for its own purposes. And "assert[ing] dominion and control" is a "seizure" in the most basic sense of the term. See *Jacobsen*, 466 U. S., at 120.[3]

## II

The Court has developed a relatively straightforward test for determining what expectations of privacy are protected by the Fourth Amendment with respect to the possession of personal property. If personal property is in the plain view of the public, the possession of the property is in no sense "private" and hence is unprotected: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v.

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[3] It follows that those with possessory interests in the can to which the beeper was attached have standing to challenge the seizure and that the "seizure" tainted all of the beeper surveillance in this case.

*United States*, 389 U. S. 347, 351 (1967).[4] When a person's property is concealed from public view, however, then the fact of his possession is private and the subject of Fourth Amendment protection.

> "One point on which the Court was in virtually unanimous agreement in *Robbins* [v. *California*, 453 U. S. 420 (1981)] was that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper. . . . [T]he central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." *United States* v. *Ross*, 456 U. S. 798, 822 (1982).

Thus, "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *Id.*, at 822–823.[5]

*United States* v. *Knotts*, 460 U. S. 276 (1983), illustrates this approach. There, agents watched as a container of chloroform in which they had placed a beeper was delivered to Knotts' codefendant and placed in his car. They then used the beeper to track the car's movements on a single trip through a public place. Used in this way the beeper did not disclose that the codefendant was in possession of the property; the agents already knew that. It revealed only the route of a trip through areas open to the public, something that was hardly concealed from public view. The Court held: "A person traveling in an automobile on public throroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.*, at 281.[6]

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[4] See *Smith* v. *Maryland*, 442 U. S. 735, 744–746 (1979); *United States* v. *Miller*, 425 U. S. 435, 442 (1976); *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973).

[5] See *United States* v. *Jacobsen*, 466 U. S. 109, 129 (1984) (WHITE, J., concurring in part and concurring in judgment); *Illinois* v. *Andreas*, 463 U. S. 765, 768, 771 (1983); *Robbins* v. *California*, 453 U. S. 420, 426–427 (1981) (plurality opinion); *Arkansas* v. *Sanders*, 442 U. S. 753, 764–765 (1979); *United States* v. *Chadwick*, 433 U. S. 1, 13, and n. 8 (1977). See also *Jacobsen*, 466 U. S., at 120, n. 17.

It is certainly true that a homeowner has a reasonable expectation of privacy in the contents of his home, including items owned by others. *Alderman* v. *United States*, 394 U. S. 165, 176–177 (1969).[7] But focusing on the interest of the homeowner should not obscure the independent interest of those in possession of property that is monitored through the use of a beeper while the property is in a home or in any other location in which it is concealed from public view.

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[6] The Court was careful to note that the beeper had not revealed anything that was not exposed to public view: "A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." 460 U. S., at 285. See also *ante*, at 713–714.

[7] I agree with the Court's response, *ante*, at 716–717, n. 4, to JUSTICE O'CONNOR's position, which I take to be that when the homeowner has no power to check the inside of a container for the presence of a beeper, he must always assume the risk that his guests will carry with them items that are being electronically monitored. Moreover, I do not believe that electronic surveillance has become or ever should be permitted to become so pervasive that homeowners must expect that containers brought into their homes are infested with electronic bugs. While *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), establishes that one may not have a reasonable expectation of privacy in the contents of a container in the possession of another, the search in that case did not occur in Rawlings' home, see *id.*, at 100–101, and hence sheds no light on the Fourth Amendment rights of the homeowner. Those rights are defined in *Alderman*, where we concluded that the homeowner may object to police conduct that reveals what has gone on in his home irrespective of whether he has any expectation of privacy in the effects that have been searched and seized: "If the police make an unwarranted search of a house and seize tangible property belonging to

In this case, the beeper enabled the agents to learn facts that were not exposed to public view. In *Knotts* the agents already saw the codefendant take possession of chloroform, and therefore the beeper accomplished no more than following the codefendant without the aid of the beeper would have. Here, once the container went into Karo's house, the agents thereafter learned who had the container and where it was only through use of the beeper. The beeper alone told them when the container was taken into private residences and storage areas, and when it was transported from one place to another.

The Court recognizes that concealment of personal property from public view gives rise to Fourth Amendment protection when it writes: "Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Ante*, at 716 (footnote omitted). This protection is not limited to times when the beeper was in a home.[8]

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third parties—even a transcript of a third-party conversation—the homeowner may object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment." 394 U. S., at 176–177 (footnote omitted).

[8] The Court seems to acknowledge as much, since it indicates that the location of property can be private even when not in a home. See *ante*, at 720, n. 6. And even if it is assumed that a beeper infringes privacy interests only with respect to the location of items concealed within a home, the "search" that the Court concludes began when the can containing the beeper went into Karo's home did not end when it left the home. When the agents monitored the beeper at a later point and learned that the can was no longer in the home, the invasion of the privacy of Karo's home continued; by learning that the can was no longer in the home the monitoring

The beeper also revealed when the can of ether had been moved. When a person drives down a public thoroughfare in a car with a can of ether concealed in the trunk, he is not exposing to public view the fact that he is in possession of a can of ether; the can is still "withdrawn from public view" and hence its location is entitled to constitutional protection. If a footlocker, see *United States* v. *Chadwick*, 433 U. S. 1 (1977), or even a "knotted scarf," entitles the owner of property to conceal its location from official inspection, then surely placing it in a car suffices as well.[9] In this case it was only the beeper that enabled the agents to discover where the can was once it had been concealed in Karo's house. At no point thereafter did the District Court find or does the Government contend that the location of the can was exposed to public view; the agents did not know when it was moved and hence would not have been able to follow its route without the aid of the beeper. Moreover, here the agents could not have employed visual surveillance to determine when the can was moved for fear of detection. *Ante*, at 714. Because the beeper enabled them to learn the location of personal

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told the agents something they otherwise would not have known about what was in Karo's home. If monitoring of a beeper constitutes a search because it "establishes that the article remains on the premises," *ante*, at 715, it is no less a search when it establishes that the article has left the premises. For this reason, the Court's holding in Part IV of its opinion that any violation of respondents' privacy rights before the can left the second warehouse did not taint its later monitoring is flawed. The later monitoring necessarily told police that the container had left areas the Court considers protected, and therefore itself violated privacy rights.

[9] It follows that I believe JUSTICE O'CONNOR's criteria are sufficient to accord an accused standing to challenge beeper surveillance—if that person had the power to prevent visual surveillance of the container and hence a reasonable expectation that the location of the property would remain private, he can challenge beeper surveillance of the container. *Ante*, at 727–728. Since it is the location of the property that is concealed from public view and hence private, those who have concealed the items are the persons whose privacy has been invaded, if the property was concealed in a place where they could reasonably expect its location would remain private. See *United States* v. *Salvucci*, 448 U. S. 83, 91–93 (1980).

property not exposed to public view, it invaded an interest embraced in the Fourth Amendment's conception of a "search."

This "search" began at the moment Karo brought the can into his house and hence concealed it from public view. As a general matter, the private citizen is entitled to assume, and in fact does assume, that his possessions are not infected with concealed electronic devices. The concealment of such items on personal property significantly compromises the owner's interest in privacy, by making it impossible to conceal that item's possession and location from the Government, despite the fact that the Fourth Amendment protects the privacy interest in the location of personal property not exposed to public view. I find little comfort in the Court's notion that no invasion of privacy occurs until a listener obtains some significant information by use of the device. *Ante,* at 712. The expectation of privacy should be measured from the standpoint of the citizen whose privacy is at stake, not of the Government. It is compromised the moment the invasion occurs. A bathtub is a less private area when the plumber is present even if his back is turned.[10]

The agents did not know who was in possession of the property or where it was once it entered Karo's house. From that moment on it was concealed from view. Because the beeper enabled the agents to learn the location of property otherwise concealed from public view, it infringed a privacy interest protected by the Fourth Amendment.[11]

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[10] The Court states: "The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest." *Ante,* at 712. Presumably the Court would also conclude that no privacy interest would be infringed by the entrance of a blindfolded plumber.

[11] It follows that I disagree with the Court's conclusion that the monitoring of the beeper that revealed it was in the second warehouse did not constitute a search. *Ante,* at 720–721. The property was concealed from public view; its location was a secret and hence by revealing its location the beeper infringed an expectation of privacy. Without the beeper, the agents would have never found the warehouse, and hence would have never set up visual surveillance of the locker containing the can of ether.

## III

The impact of beeper surveillance upon interests protected by the Fourth Amendment leads me to what I regard as the perfectly sensible conclusion that absent exigent circumstances Government agents have a constitutional duty to obtain a warrant before they install an electronic device on a private citizen's property.

Because the Government does not challenge the conclusion that the warrant purporting to authorize the installation of the beeper was obtained improperly, I would affirm the judgment of the Court of Appeals. I would not engage in a *de novo* examination of the record in an effort to determine whether there is sufficient information independent of that obtained by means of the beeper to support the issuance of the warrant to search the Taos house. That question was not raised in the petition for certiorari and has not been briefed by the parties.[12] Surely this is an inquiry that should be made in the first instance by the trial court after the parties have had an opportunity to argue the issue.

Accordingly, I respectfully dissent.

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[12] The questions presented in the petition for certiorari are:

"1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

"2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other 'private' area (such as a commercial storage locker)." Pet. for Cert. I.

I fail to see how the discussion in Part IV of the opinion of the Court addresses either of these questions. To the contrary, it appears that the Court has concluded that the Court of Appeals answered both of these questions correctly even as it reverses the judgment.

# ALLEN *v.* WRIGHT ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81–757. Argued February 29, 1984—Decided July 3, 1984*

The Internal Revenue Service (IRS) denies tax-exempt status under the Internal Revenue Code—and hence eligibility to receive charitable contributions deductible from income taxes under the Code—to racially discriminatory private schools, and has established guidelines and procedures for determining whether a particular school is in fact racially nondiscriminatory. Respondents, parents of black children who were attending public schools in seven States in school districts undergoing desegregation, brought a nationwide class action in Federal District Court against petitioner Government officials (petitioner Allen, the head of a private school identified in the complaint, intervened as a defendant), alleging that the IRS has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools and has thereby harmed respondents directly and interfered with their children's opportunity to receive an education in desegregated public schools. Respondents also alleged that many racially segregated private schools were created or expanded in their communities at the time the public schools were undergoing desegregation, and had received tax exemptions despite the IRS policy and guidelines; and that these unlawful tax exemptions harmed respondents in that they constituted tangible financial aid for racially segregated educational institutions and encouraged the organization and expansion of institutions that provided segregated educational opportunities for white students avoiding attendance in the public schools. Respondents did not allege that their children had ever applied or would ever apply for admission to any private school. They sought declaratory and injunctive relief. The District Court dismissed the complaint on the ground that respondents lacked standing to bring the suit. The Court of Appeals reversed.

*Held:* Respondents do not have standing to bring this suit. Pp. 750–766.

(a) The "case or controversy" requirement of Art. III of the Constitution defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded, and the Art. III

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*Together with No. 81–970, *Regan, Secretary of the Treasury, et al.* v. *Wright et al.*, also on certiorari to the same court.

doctrine of "standing" has a core constitutional component that a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. The concepts of standing doctrine present questions that must be answered by reference to the Art. III notion that federal courts may exercise power only in the last resort and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process. Pp. 750–752.

(b) Respondents' claim that they are harmed directly by the mere fact of Government financial aid to discriminatory private schools fails because it does not constitute judicially cognizable injury. Insofar as the claim may be interpreted as one simply to have the Government avoid the alleged violation of law in granting the tax exemptions, an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. Nor do respondents have standing to litigate their claim based on the stigmatizing injury often caused by racial discrimination. Such injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct, and respondents do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment. Pp. 753–756.

(c) Respondents' claim of injury as to their children's diminished ability to receive an education in a racially integrated school because of the federal tax exemptions granted to some racially discriminatory private schools—though a judicially cognizable injury—fails because the alleged injury is not fairly traceable to the Government conduct that is challenged as unlawful. Respondents have not alleged that there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Moreover, it is entirely speculative whether withdrawal of a particular school's tax exemption would lead the school to change its policies; whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in policy of a private school threatened with loss of tax-exempt status; or whether, in a particular community, a large enough number of school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools. To recognize respondents' standing to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties would run afoul of the idea of separation of powers that underlies standing doctrine. The

Constitution assigns to the Executive Branch, not to the Judicial Branch, the duty to take care that the laws be faithfully executed. Pp. 756–761.

(d) None of the cases relied on by the Court of Appeals and by respondents to establish standing—*Gilmore* v. *City of Montgomery*, 417 U. S. 556; *Norwood* v. *Harrison*, 413 U. S. 455; and *Coit* v. *Green*, 404 U. S. 997, summarily aff'g *Green* v. *Connally*, 330 F. Supp. 1150—requires a finding of standing here. Pp. 761–766.

211 U. S. App. D. C. 231, 656 F. 2d 820, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 766. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 783. MARSHALL, J., took no part in the decision of the cases.

*Solicitor General Lee* argued the cause for petitioners in No. 81–970. With him on the briefs were *Assistant Attorney General Archer*, *Deputy Solicitor General Wallace*, *Ernest J. Brown*, and *Robert S. Pomerance*. *William J. Landers II* argued the cause for petitioner in No. 81–757. With him on the brief was *S. Shepherd Tate*.

*Robert H. Kapp* argued the cause for respondents. With him on the brief were *Joseph M. Hassett*, *David S. Tatel*, *William L. Robinson*, *Norman J. Chachkin*, and *Frank R. Parker*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

Parents of black public school children allege in this nationwide class action that the Internal Revenue Service (IRS) has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. They assert that the IRS thereby harms them directly and interferes with the ability of their children to receive an education in desegregated public schools. The issue before us is whether plaintiffs have standing to bring this suit. We hold that they do not.

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†*Wilfred R. Caron* and *Angelo Aiosa* filed a brief for the United States Catholic Conference as *amicus curiae* urging reversal.

*Thomas I. Atkins* and *Harold Flannery* filed a brief for the National Association for the Advancement of Colored People et al. as *amici curiae* urging affirmance.

## I

The IRS denies tax-exempt status under §§ 501(a) and (c)(3) of the Internal Revenue Code, 26 U. S. C. §§ 501(a) and (c)(3)—and hence eligibility to receive charitable contributions deductible from income taxes under §§ 170(a)(1) and (c)(2) of the Code, 26 U. S. C. §§ 170(a)(1) and (c)(2)—to racially discriminatory private schools. Rev. Rul. 71–447, 1971–2 Cum. Bull. 230.[1] The IRS policy requires that a school applying for tax-exempt status show that it "admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs." *Ibid.* To carry out this policy, the IRS has established guidelines and procedures for determining whether a particular school is in fact racially nondiscriminatory. Rev. Proc. 75–50, 1975–2 Cum. Bull. 587.[2] Failure to comply with the guidelines "will ordinarily result in the proposed revocation of" tax-exempt status. *Id.*, § 4.08, p. 589.

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[1] As the Court explained last Term in *Bob Jones University* v. *United States*, 461 U. S. 574, 579 (1983), the IRS announced this policy in 1970 and formally adopted it in 1971. Rev. Rul. 71–447, 1971–2 Cum. Bull. 230. This change in prior policy was prompted by litigation over tax exemptions for racially discriminatory private schools in the State of Mississippi, litigation that resulted in the entry of an injunction against the IRS largely if not entirely coextensive with the position the IRS had voluntarily adopted. *Green* v. *Kennedy*, 309 F. Supp. 1127 (DC) (entering preliminary injunction), appeal dism'd *sub nom. Cannon* v. *Green*, 398 U. S. 956 (1970); *Green* v. *Connally*, 330 F. Supp. 1150 (DC) (entering permanent injunction), summarily aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971).

[2] The 1975 guidelines replaced guidelines issued for the same purpose in 1972. Rev. Proc. 72–54, 1972–2 Cum. Bull. 834.

The guidelines provide that "[a] school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." *Id.*, § 2.02.[3] The school must state its nondiscrimination policy in its organizational charter, *id.*, § 4.01, pp. 587–588, and in all of its brochures, catalogs, and other advertisements to prospective students, *id.*, § 4.02, p. 588. The school must make its nondiscrimination policy known to the entire community served by the school and must publicly disavow any contrary representations made on its behalf once it becomes aware of them. *Id.*, § 4.03.[4] The school must have nondiscrimina-

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[3] The definition of "racially nondiscriminatory policy" is qualified in one respect: "A policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students." Rev. Proc. 75–50, § 3.02, 1975–2 Cum. Bull. 587.

[4] One way a school can satisfy the publication requirement is to disseminate notice of the nondiscrimination policy through the print or broadcast media. *Id.*, § 4.03–1, p. 588. Detailed IRS rules govern what print and broadcast media may be selected as well as the content of the notice. *Ibid.* Although the IRS encourages all schools to follow that route, see *id.*, § 4.03–2, p. 589, there are three alternative ways to satisfy the publication requirement.

First, a parochial or church-related school at least 75% of whose students in the preceding three years were members of the church satisfies the requirement if it gives notice of its nondiscrimination policy in church publications, unless it advertises in newspapers of general circulation. *Id.*, § 4.03–2(a), p. 588. Second, a school that draws its students from areas larger than the local community satisfies the requirement if it enrolls minority students in meaningful numbers or engages in promotional and recruitment activities reasonably designed to reach all racial segments of the areas from which students are drawn. *Id.*, § 4.03–2(b). Third, a school serving only a local community satisfies the publication requirement if it actually enrolls minority students in meaningful numbers. *Id.*, § 4.03–2(c), pp. 588–589. A school choosing any of these three options tory policies concerning all programs and facilities, *id.*, § 4.04, p. 589, including scholarships and loans, *id.*, § 4.05,[5] and the school must annually certify, under penalty of perjury, compliance with these requirements, *id.*, § 4.07.[6]

The IRS rules require a school applying for tax-exempt status to give a breakdown along racial lines of its student body and its faculty and administrative staff, *id.*, § 5.01–1, as well as of scholarships and loans awarded, *id.*, § 5.01–2. They also require the applicant school to state the year of its organization, *id.*, § 5.01–5, and to list "incorporators, founders, board members, and donors of land or buildings," *id.*, § 5.01–3, and state whether any of the organizations among these have an objective of maintaining segregated public or private school education, *id.*, § 5.01–4. The rules further provide that, once given an exemption, a school must keep specified records to document the extent of compliance with the IRS guidelines. *Id.*, § 7, p. 590.[7] Finally, the

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"must be prepared to demonstrate" on audit that this choice was justified. *Id.*, § 4.03–2, p. 589.

[5] Scholarships and loans must generally be available without regard to race, and this fact must be known in the community served by the school. An exception is made, however, consistent with § 3.02 of Rev. Proc. 75–50, 1975–2 Cum. Bull. 587, see n. 3, *supra*, for financial assistance programs favoring minority students that are designed to promote the school's nondiscriminatory policy. A second exception is made for financial assistance programs "favoring members of one or more racial groups that do not significantly derogate from the school's racially nondiscriminatory policy . . . ." Rev. Proc. 75–50, § 4.05, 1975–2 Cum. Bull. 589.

[6] The regulations also declare that discrimination in the employment of faculty and administrative staff (or its absence) is indicative of discrimination with respect to students (or its absence). *Id.*, § 4.07.

[7] Records must be kept, and preserved for three years, concerning the racial composition of the student body, the faculty and administrative staff, and the group of students receiving financial assistance. Copies of brochures, catalogs, and advertising must also be kept. *Id.*, § 7.01, p. 590. Although the method of figuring racial composition must be described in the records compiled by the school, the school need not require students, applicants, or staff to furnish information not otherwise required, and the school generally need not release personally identifiable records. *Id.*,

rules announce that any information concerning discrimination at a tax-exempt school is officially welcomed. *Id.*, § 6.[8]

In 1976 respondents challenged these guidelines and procedures in a suit filed in Federal District Court against the Secretary of the Treasury and the Commissioner of Internal Revenue.[9] The plaintiffs named in the complaint are parents of black children who, at the time the complaint was filed, were attending public schools in seven States in school districts undergoing desegregation. They brought this nationwide class action "on behalf of themselves and their children, and . . . on behalf of all other parents of black children attending public school systems undergoing, or which may in the future undergo, desegregation pursuant to court order [or] HEW regulations and guidelines, under state law, or voluntarily." App. 22–23. They estimated that the class they seek to represent includes several million persons. *Id.*, at 23.

Respondents allege in their complaint that many racially segregated private schools were created or expanded in their communities at the time the public schools were undergoing desegregation. *Id.*, at 23–24. According to the complaint, many such private schools, including 17 schools or school systems identified by name in the complaint (perhaps some 30 schools in all), receive tax exemptions either directly or through the tax-exempt status of "umbrella" organizations that operate or support the schools. *Id.*, at 23–38.[10] Respondents allege that, despite the IRS policy of denying tax-exempt status to racially discriminatory private schools and despite the IRS guidelines and procedures for implementing that policy, some of the tax-exempt racially segregated private schools created or expanded in desegregating districts in fact have racially discriminatory policies. *Id.*, at 17–18 (IRS permits "schools to receive tax exemptions merely on the basis of adopting and certifying—but not implementing—a policy of nondiscrimination"); *id.*, at 25 (same).[11] Respond-

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§ 7.02. Cf. *id.*, § 5.02, pp. 589–590 (information furnished by applicant for tax-exempt status subject to similar qualifications). Reports containing the required information, if filed in accordance with law with a Government agency, may satisfy the recordkeeping requirement if the information is current and the school maintains copies of the reports. *Id.*, § 7.03, p. 590. Failure to maintain the required records gives rise to a presumption of noncompliance with the guidelines. *Id.*, § 7.04.

[8] The Revenue Procedure expressly notes, *id.*, § 8, that its provisions are superseded by, to the extent they differ from, the injunction concerning Mississippi schools issued in *Green* v. *Connally*, 330 F. Supp. 1150 (DC), summarily aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971).

[9] Shortly before respondents filed this action, the plaintiffs in the *Green* litigation, concerning the tax-exempt status of private schools in Mississippi, *ibid.*, moved to reopen that suit, making allegations comparable to those in respondents' complaint. See *Wright* v. *Regan*, 211 U. S. App. D. C. 231, 236, 656 F. 2d 820, 825 (1981). In 1977, the Mississippi litigation was consolidated with this suit. *Ibid.* The *Green* litigation was not consolidated with this lawsuit on appeal, however, and it is not before this Court.

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[10] Hereafter, references to a private school's tax exemption embrace both tax-exempt status of the school and tax-exempt status of an "umbrella" organization. We assume, without deciding, that a grant of tax-exempt status to an "umbrella" organization of the sort respondents have in mind is subject to the same legal constraints as a grant of tax-exempt status directly to a school.

[11] The complaint generally uses the phrase "racially segregated school" to mean simply that no or few minority students attend the school, irrespective of the school's maintenance of racially discriminatory policies or practices. Although the complaint, on its face, alleges that granting tax-exempt status to any "racially segregated" school in a desegregating public school district is unlawful, App. 39, it is clear that respondents premise their allegation of illegality on discrimination, not on segregation alone.

The nub of respondents' complaint is that current IRS guidelines and procedures are inadequate to detect false certifications of nondiscrimination policies. See *id.*, at 17–18, 25. This allegation would be superfluous if respondents were claiming that racial segregation even without racial discrimination made the grant of tax-exempt status unlawful. Moreover, respondents have noticeably refrained from asserting that the IRS violates the law when it grants a tax exemption to a nondiscriminatory private school that happens to have few minority students. Indeed, respondents' brief in this Court makes a point of noting that their complaint alleges not only segregation but discrimination, see Brief for Respondents 10, n. 8, ents allege that the IRS grant of tax exemptions to such racially discriminatory schools is unlawful.[12]

Respondents allege that the challenged Government conduct harms them in two ways. The challenged conduct

> "(a) constitutes tangible federal financial aid and other support for racially segregated educational institutions, and
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> "(b) fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems." *Id.*, at 38–39.

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and it repeatedly states that the challenged Government conduct is the granting of tax exemptions to racially discriminatory private schools, see, *e. g., id.*, at 9–10 ("Respondents alleged that the federal petitioners are continuing to grant tax-exempt status to racially discriminatory private schools . . ."); *id.*, at 13–14.

Since respondents' entire argument is built on the assertion that their rights are violated by IRS grants of tax-exempt status to some number of unidentified racially discriminatory private schools in desegregating districts, we resolve the ambiguity in respondents' complaint by reading it as making that assertion.

Contrary to JUSTICE BRENNAN's statement, *post*, at 768, the complaint does not allege that each desegregating district in which they reside contains one or more racially discriminatory private schools unlawfully receiving a tax exemption.

[12] The complaint alleges that the challenged IRS conduct violates several laws: § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3); Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.;* Rev. Stat. § 1977, 42 U. S. C. § 1981; and the Fifth and Fourteenth Amendments to the United States Constitution.

Last Term, in *Bob Jones University* v. *United States*, 461 U. S. 574 (1983), the Court concluded that racially discriminatory private schools do not qualify for a tax exemption under § 501(c)(3) of the Internal Revenue Code.

Thus, respondents do not allege that their children have been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge as unlawful. Indeed, they have not alleged at any stage of this litigation that their children have ever applied or would ever apply to any private school. See *Wright* v. *Regan*, 211 U. S. App. D. C. 231, 238, 656 F. 2d 820, 827 (1981) ("Plaintiffs . . . maintain they have no interest whatever in enrolling their children in a private school"). Rather, respondents claim a direct injury from the mere fact of the challenged Government conduct and, as indicated by the restriction of the plaintiff class to parents of children in desegregating school districts, injury to their children's opportunity to receive a desegregated education.[13] The latter injury is traceable to the IRS grant of tax exemptions to racially discriminatory schools, respondents allege, chiefly because contributions to such schools are deductible from income taxes under §§ 170(a)(1) and (c)(2) of the Internal Revenue Code and the "deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts." App. 24.[14]

Respondents request only prospective relief. *Id.*, at 40–41. They ask for a declaratory judgment that the challenged IRS tax-exemption practices are unlawful. They also ask for an injunction requiring the IRS to deny tax exemptions to a considerably broader class of private schools than the class of racially discriminatory private schools. Under the requested injunction, the IRS would have to deny tax-exempt status to all private schools

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[13] Respondents did not allege in their 1976 complaint that their children were currently attending racially segregated schools. In 1979, during argument before the District Court, counsel for respondents stated that his clients' children "do go to desegregated schools . . . ." App. 62.

[14] Several additional tax benefits accrue to an organization receiving a tax exemption under § 501(c)(3) of the Code. Such an organization is exempt not only from income taxes but also from federal social security taxes, 26 U. S. C. § 3121(b)(8)(B), and from federal unemployment taxes, 26 U. S. C. § 3306(c)(8). Moreover, contributions to the organization are deductible not only from income taxes, 26 U. S. C. §§ 170(a)(1) and (c)(2), but also from federal estate taxes, 26 U. S. C. § 2055(a)(2), and from federal gift taxes, 26 U. S. C. § 2522(a)(2).

> "which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either—
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> "(1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;
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> "(2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or
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> "(3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems . . . ." *Id.*, at 40.

Finally, respondents ask for an order directing the IRS to replace its 1975 guidelines with standards consistent with the requested injunction.

In May 1977 the District Court permitted intervention as a defendant by petitioner Allen, the head of one of the private school systems identified in the complaint. *Id.*, at 54–55. Thereafter, progress in the lawsuit was stalled for several years. During this period, the IRS reviewed its challenged policies and proposed new Revenue Procedures to tighten requirements for eligibility for tax-exempt status for private schools. See 43 Fed. Reg. 37296 (1978); 44 Fed. Reg. 9451 (1979).[15] In 1979, however, Congress blocked any strengthening of the IRS guidelines at least until October 1980.[16] The District Court thereupon considered and granted the defendants' motion to dismiss the complaint, concluding that respondents lack standing, that the judicial task proposed by respondents is inappropriately intrusive for a federal court, and that awarding the requested relief would be contrary to the will of Congress expressed in the 1979 ban on strengthening IRS guidelines. *Wright* v. *Miller*, 480 F. Supp. 790 (DC 1979).

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[15] The first proposal was made on August 22, 1978. 43 Fed. Reg. 37296. It placed the burden of proving good faith operation on a nondiscriminatory basis, evaluated according to specified factors, on any private school that had an insignificant number of minority students and that had been formed or substantially expanded at a time the public schools in its community were undergoing desegregation. The second proposal was made

The United States Court of Appeals for the District of Columbia Circuit reversed, concluding that respondents have standing to maintain this lawsuit. The court acknowledged that *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26 (1976), "suggests that litigation concerning tax liability is a matter between taxpayer and IRS, with the door

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on February 13, 1979, after public comment and hearings. 44 Fed. Reg. 9451. It afforded private schools "greater flexibility" in proving nondiscriminatory operation, permitting satisfaction of this proof requirement by a showing that the school has "undertaken actions or programs reasonably designed to attract minority students on a continuing basis." *Id.*, at 9452, 9454.

[16] Treasury, Postal Service, and General Government Appropriations Act of 1980, §§ 103 and 615, 93 Stat. 562, 577. Section 615 of the Act, known as the Dornan Amendment, specifically forbade the use of funds to carry out the IRS's proposed Revenue Procedures. Section 103 of the Act, known as the Ashbrook Amendment, more generally forbade the use of funds to make the requirements for tax-exempt status of private schools more stringent than those in effect prior to the IRS's proposal of its new Revenue Procedures.

These provisions expired on October 1, 1980, but Congress maintained its interest in IRS policies regarding tax exemptions for racially discriminatory private schools. The Dornan and Ashbrook Amendments were reinstated for the period December 16, 1980, through September 30, 1981. H. J. Res. 644, Pub. L. 96-536, §§ 101(a)(1) and (4), 94 Stat. 3166, as amended by Supplemental Appropriations and Rescission Act of 1981, § 401, 95 Stat. 95. For fiscal year 1982, Congress specifically denied funding for carrying out not only administrative actions but also court orders entered after the date of the IRS's proposal of its first revised Revenue Procedure. H. J. Res. 325, Pub. L. 97-51, § 101(a)(3), 95 Stat. 958. No such spending restrictions are currently in force.

barely ajar for third party challenges." 211 U. S. App. D. C., at 239, 656 F. 2d, at 828. The court concluded, however, that the *Simon* case is inapposite because respondents claim no injury dependent on taxpayers' actions: "[t]hey claim indifference as to the course private schools would take." *Id.*, at 240, 656 F. 2d, at 829.[17] Instead, the court observed, "[t]he sole injury [respondents] claim is the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth." *Id.*, at 238, 656 F. 2d, at 827. The court held this denigration injury enough to give respondents standing since it was this injury which supported standing in *Coit* v. *Green*, 404 U. S. 997 (1971), summarily aff'g *Green* v. *Connally*, 330 F. Supp. 1150 (DC); *Norwood* v. *Harrison*, 413 U. S. 455 (1973); and *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974). 211 U. S. App. D. C., at 239–243, 656 F. 2d, at 828–832. The Court of Appeals also held that the 1979 congressional actions were not intended to preclude judicial remedies and that the relief requested by respondents could be fashioned "without large scale judicial intervention in the administrative process," *id.*, at 248, 656 F. 2d, at 837.[18] The court accordingly remanded the case to the District Court for further proceedings, enjoining the defendants meanwhile from granting tax-exempt status to any racially discriminatory school, App. 81–84.

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[17] Indeed, the Court of Appeals observed that respondents "do not dispute that it is 'speculative,' within the *Eastern Kentucky* frame, whether any private school would welcome blacks in order to retain tax exemption or would relinquish exemption to retain current practices." 211 U. S. App. D. C., at 240, 656 F. 2d, at 829 (footnotes omitted).

[18] Judge Tamm dissented from the holding of the Court of Appeals. He concluded that standing in the three cases relied on by the majority was based on injury to rights under a court decree and that respondents in this case asserted nothing more than the abstract interest in securing enforcement of the law against the Government. *Id.*, at 249–259, 656 F. 2d, at 838–848.

The Government defendants and defendant-intervenor Allen filed separate petitions for a writ of certiorari in this Court. They both sought review of the Court of Appeals' holding that respondents have standing to bring this lawsuit. We granted certiorari, 462 U. S. 1130 (1983), and now reverse.

## II

### A

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." As the Court explained in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471–476 (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975).

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Vander Jagt* v. *O'Neill*, 226 U. S. App. D. C. 14, 26–27, 699 F. 2d 1166, 1178–1179 (1983) (Bork, J., concurring).

The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.

The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin, supra,* at 498. Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. See *Valley Forge, supra,* at 474–475. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. 454 U. S., at 472.

Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, "'distinct and palpable,'" *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 100 (1979) (quoting *Warth* v. *Seldin, supra,* at 501), and not "abstract" or "conjectural" or "hypothetical," *Los Angeles* v. *Lyons,* 461 U. S. 95, 101–102 (1983); *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974). The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. See *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U. S., at 38, 41. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

The absence of precise definitions, however, as this Court's extensive body of case law on standing illustrates, see generally *Valley Forge, supra,* at 471–476, hardly leaves courts at sea in applying the law of standing. Like most legal notions, the standing concepts have gained considerable definition from developing case law. In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases. See, *e. g.*, *Los Angeles* v. *Lyons*, *supra*, at 102–105. More important, the law of Art. III standing is built on a single basic idea—the idea of separation of powers. It is this fact which makes possible the gradual clarification of the law through judicial application. Of course, both federal and state courts have long experience in applying and elaborating in numerous contexts the pervasive and fundamental notion of separation of powers.

Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892), and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process," *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). See *Valley Forge*, 454 U. S., at 472–473.

## B

Respondents allege two injuries in their complaint to support their standing to bring this lawsuit. First, they say that they are harmed directly by the mere fact of Government financial aid to discriminatory private schools. Second, they say that the federal tax exemptions to racially discriminatory private schools in their communities impair their ability to have their public schools desegregated. See *supra*, at 745.

In the Court of Appeals, respondents apparently relied on the first injury. Thus, the court below asserted that "[t]he sole injury [respondents] claim is the denigration they suffer" as a result of the tax exemptions. 211 U. S. App. D. C., at 238, 656 F. 2d, at 827. In this Court, respondents have not focused on this claim of injury. Here they stress the effect of the tax exemptions on their "equal educational opportunities," see, *e. g.*, Brief for Respondents 12, 14, renewing reliance on the second injury described in their complaint.

Because respondents have not clearly disclaimed reliance on either of the injuries described in their complaint, we address both allegations of injury. We conclude that neither suffices to support respondents' standing. The first fails under clear precedents of this Court because it does not constitute judicially cognizable injury. The second fails because the alleged injury is not fairly traceable to the assertedly unlawful conduct of the IRS.[19]

### 1

Respondents' first claim of injury can be interpreted in two ways. It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race.[20] Under neither interpretation is this claim of injury judicially cognizable.

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[19] The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement." C. Wright, Law of Federal Courts § 13, p. 68, n. 43 (4th ed. 1983). To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the "redressability" component is to focus on the requested relief. Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of law—grants of tax exemptions to racially discriminatory schools in respondents' communities.

This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. In *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208 (1974), for example, the Court rejected a claim of citizen standing to challenge Armed Forces Reserve commissions held by Members of Congress as violating the Incompatibility Clause of Art. I, § 6, of the Constitution. As citizens, the Court held, plaintiffs alleged nothing but "the abstract injury in nonobservance of the Constitution . . . ." *Id.*, at 223, n. 13. More recently, in *Valley Forge*, *supra*, we rejected a claim of standing to challenge a Government conveyance of property to a religious institution. Insofar as the plaintiffs relied simply on "'their shared individuated right'" to a Government that made no law respecting an establishment of religion, *id.*, at 482 (quoting *Americans United* v. *U. S. Dept. of HEW*, 619 F. 2d 252, 261 (CA3 1980)), we held that plaintiffs had not alleged a judicially cognizable injury. "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." 454 U. S., at 483. See also *United States* v. *Richardson*, 418 U. S. 166 (1974); *Laird* v. *Tatum*, 408 U. S. 1 (1972);

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[20] We assume, *arguendo*, that the asserted stigmatic injury may be caused by the Government's grant of tax exemptions to racially discriminatory schools even if the Government is granting those exemptions without knowing or believing that the schools in fact discriminate. That is, we assume, without deciding, that the challenged Government tax exemptions are the equivalent of Government discrimination.

*Ex parte Lévitt*, 302 U. S. 633 (1937). Respondents here have no standing to complain simply that their Government is violating the law.

Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. See *Heckler* v. *Mathews*, 465 U. S. 728, 739–740 (1984). Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct, *ibid.*

In *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), the Court held that the plaintiff had no standing to challenge a club's racially discriminatory membership policies because he had never applied for membership. *Id.*, at 166–167. In *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), the Court held that the plaintiffs had no standing to challenge racial discrimination in the administration of their city's criminal justice system because they had not alleged that they had been or would likely be subject to the challenged practices. The Court denied standing on similar facts in *Rizzo* v. *Goode*, 423 U. S. 362 (1976). In each of those cases, the plaintiffs alleged official racial discrimination comparable to that alleged by respondents here. Yet standing was denied in each case because the plaintiffs were not personally subject to the challenged discrimination. Insofar as their first claim of injury is concerned, respondents are in exactly the same position: unlike the appellee in *Heckler* v. *Mathews*, *supra*, at 740–741, n. 9, they do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment.

The consequences of recognizing respondents' standing on the basis of their first claim of injury illustrate why our cases plainly hold that such injury is not judicially cognizable. If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). Constitutional limits on the role of the federal courts preclude such a transformation.[21]

### 2

It is in their complaint's second claim of injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances. The injury they identify—their children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases from *Brown* v. *Board of Education*, 347 U. S. 483 (1954), to *Bob Jones University* v. *United States*, 461 U. S. 574 (1983), one of the most serious injuries recognized in our legal system. Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it unless standing requirements are met. In this case, respondents' second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.[22]

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[21] Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489–490, n. 26 (1982) (citations omitted): "Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a ' "personal constitutional right" to a government that does not establish religion,' a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution."

The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 42. As the Court pointed out in *Warth* v. *Seldin*, 422 U. S., at 505, "the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III . . . ."

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[22] Respondents' stigmatic injury, though not sufficient for standing in the abstract form in which their complaint asserts it, is judicially cognizable to the extent that respondents are personally subject to discriminatory treatment. See *Heckler* v. *Mathews*, 465 U. S. 728, 739–740 (1984). The stigmatic injury thus requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine.

In *Heckler* v. *Mathews*, for example, the named plaintiff (appellee) was being denied monetary benefits allegedly on a discriminatory basis. We specifically pointed out that the causation component of standing doctrine was satisfied with respect to the claimed benefits. In distinguishing the case from *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26 (1976), we said: "there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered—denial of Social Security benefits solely on the basis of his gender." 465 U. S., at 741, n. 9.

In this litigation, respondents identify only one interest that they allege is being discriminatorily impaired—their interest in desegregated public school education. Respondents' asserted stigmatic injury, therefore, is sufficient to support their standing in this litigation only if their school-desegregation injury independently meets the causation requirement of standing doctrine.

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation. It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions.[23] Moreover, it is entirely speculative, as respondents themselves conceded in the Court of Appeals, see n. 17, *supra*, whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. See 480 F. Supp., at 796. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

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[23] Indeed, contrary to the suggestion of JUSTICE BRENNAN's dissent, *post*, at 774–775, and n. 5, of the schools identified in respondents' complaint, none of those alleged to be directly receiving a tax exemption is alleged to be racially discriminatory, and only four schools—Delta Christian Academy and Tallulah Academy in Madison Parish, La.; River Oaks School in Monroe, La.; and Bowman Academy in Orangeburg, S. C.—are alleged to have discriminatory policies that deprive them of direct tax exemptions yet operate under the umbrella of a tax-exempt organization. These allegations constitute an insufficient basis for the only claim made by respondents—a claim for a change in the IRS regulations and practices. Cf. *Wright* v. *Miller*, 480 F. Supp. 790, 796 (DC 1979) ("it is purely speculative whether, in the final analysis, any fewer schools would be granted tax exemptions under plaintiffs' system than under the current IRS system").

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing. In *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, the Court held that standing to challenge a Government grant of a tax exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals' policy concerning the provision of medical services to indigents.[24] The causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action. *Id.*, at 40–46. See also *Warth* v. *Seldin*, *supra*. The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 41. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

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[24] *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, framed its standing discussion in terms of the redressability of the alleged injury. The relief requested by the plaintiffs, however, was simply the cessation of the allegedly illegal conduct. In those circumstances, as the opinion for the Court in *Simon* itself illustrates, see *id.*, at 40–46, the "redressability" analysis is identical to the "fairly traceable" analysis. See n. 19, *supra*.

> "Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action." *Laird* v. *Tatum*, 408 U. S., at 15.

See also *Gilligan* v. *Morgan*, 413 U. S. 1, 14 (1973) (BLACKMUN, J., concurring).

The same concern for the proper role of the federal courts is reflected in cases like *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), *Rizzo* v. *Goode*, 423 U. S. 362 (1976), and *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983). In all three cases plaintiffs sought injunctive relief directed at certain systemwide law enforcement practices.[25] The Court held in each case that, absent an allegation of a specific threat of being subject to the challenged practices, plaintiffs had no standing to ask for an injunction. Animating this Court's holdings was the principle that "[a] federal court . . . is not the proper forum to press" general complaints about the way in which government goes about its business. *Id.*, at 112.

Case-or-controversy considerations, the Court observed in *O'Shea* v. *Littleton*, *supra*, at 499, "obviously shade into those determining whether the complaint states a sound basis for equitable relief." The latter set of considerations should therefore inform our judgment about whether respondents have standing. Most relevant to this case is the principle articulated in *Rizzo* v. *Goode*, *supra*, at 378–379:

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[25] In *O'Shea* v. *Littleton* and *Rizzo* v. *Goode*, the plaintiffs sought wide-ranging reform of local law enforcement systems. In *Los Angeles* v. *Lyons*, by contrast, the plaintiff sought cessation of a particular police practice. The Court concluded in *Lyons*, however, that this difference did not distinguish the cases for standing purposes as long as the plaintiff could show no realistic threat of being subject to the challenged practice.

> "When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896 (1961),' quoted in *Sampson* v. *Murray*, 415 U. S. 61, 83 (1974)."

When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, §3. We could not recognize respondents' standing in this case without running afoul of that structural principle.[26]

### C

The Court of Appeals relied for its contrary conclusion on *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974), on *Norwood* v. *Harrison*, 413 U. S. 455 (1973), and on *Coit* v. *Green*, 404 U. S. 997 (1971), summarily aff'g *Green* v. *Con-*

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[26] We disagree with JUSTICE STEVENS' suggestions that separation of powers principles merely underlie standing requirements, have no role to play in giving meaning to those requirements, and should be considered only under a distinct justiciability analysis. *Post*, at 789–792. Moreover, our analysis of this case does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable. *Post*, at 792–793. Rather, we rely on separation of powers principles to interpret the "fairly traceable" component of the standing requirement.

*nally*, 330 F. Supp. 1150 (DC). Respondents in this Court, though stressing a different injury from the one emphasized by the Court of Appeals, see *supra*, at 752–753, place principal reliance on those cases as well. None of the cases, however, requires that we find standing in this lawsuit.

In *Gilmore* v. *City of Montgomery*, *supra*, the plaintiffs asserted a constitutional right, recognized in an outstanding injunction, to use the city's public parks on a nondiscriminatory basis. They alleged that the city was violating that equal protection right by permitting racially discriminatory private schools and other groups to use the public parks. The Court recognized plaintiffs' standing to challenge this city policy insofar as the policy permitted the exclusive use of the parks by racially discriminatory private schools: the plaintiffs had alleged direct cognizable injury to their right to nondiscriminatory access to the public parks. *Id.*, at 570–571, n. 10.[27]

Standing in *Gilmore* thus rested on an allegation of direct deprivation of a right to equal use of the parks. Like the plaintiff in *Heckler* v. *Mathews*—indeed, like the plaintiffs having standing in virtually any equal protection case—the plaintiffs in *Gilmore* alleged that they were personally being denied equal treatment. 465 U. S., at 740–741, n. 9. The *Gilmore* Court did not rest its finding of standing on an abstract denigration injury, and no problem of attenuated causation attended the plaintiffs' claim of injury.[28]

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[27] On the merits, the Court found that permitting such exclusive use by school groups was unlawful, because it violated the city's constitutional obligation, spelled out in an outstanding school-desegregation order, to take no action that would impede the integration of the public schools. Exclusive availabililty of the public parks "significantly enhanced the attractiveness of segregated private schools . . . by enabling them to offer complete athletic programs." 417 U. S., at 569.

[28] Indeed, the Court stressed the importance of a particularized factual record when it stated that it was "not prepared, at this juncture and on this record, to assume the standing of these plaintiffs to claim relief against certain nonexclusive uses by private school groups." *Id.*, at 570, n. 10. "Without a properly developed record," said the Court, it was not clear

In *Norwood* v. *Harrison*, *supra*, parents of public school children in Tunica County, Miss., filed a statewide class action challenging the State's provision of textbooks to students attending racially discriminatory private schools in the State. The Court held the State's practice unconstitutional because it breached "the State's acknowledged duty to establish a unitary school system," *id.*, at 460–461. See *id.*, at 463–468. The Court did not expressly address the basis for the plaintiffs' standing.

In *Gilmore*, however, the Court identified the basis for standing in *Norwood:* "The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered." 417 U. S., at 571, n. 10. Through the school-desegregation decree, the plaintiffs had acquired a right to have the State "steer clear" of any perpetuation of the racially dual school system that it had once sponsored. 413 U. S., at 467. The interest acquired was judicially cognizable because it was a personal interest, created by law, in having the State refrain from taking specific actions. Cf. *Warth* v. *Seldin*, 422 U. S., at 500 (standing may exist by virtue of legal rights created by statute). The plaintiffs' complaint alleged that the State directly injured that interest by aiding racially discriminatory private schools. Respondents in this lawsuit, of course, have no injunctive rights against the IRS that are allegedly being harmed by the challenged IRS action.

Unlike *Gilmore* and *Norwood*, *Coit* v. *Green*, *supra*, cannot easily be seen to have based standing on an injury different in kind from any asserted by respondents here. The plaintiffs

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that such nonexclusive use "would result in cognizable injury to these plaintiffs." *Id.*, at 571, n. 10.

The Court said nothing about the plaintiffs' standing to challenge the use of the parks, exclusive or nonexclusive, by racially discriminatory groups other than schools. It was unnecessary to do so because the Court declined to consider the merits of that challenge on the record before it. *Id.*, at 570–574.

in *Coit*, parents of black schoolchildren in Mississippi, sued to enjoin the IRS grant of tax exemptions to racially discriminatory private schools in the State. Nevertheless, *Coit* in no way mandates the conclusion that respondents have standing.

First, the decision has little weight as a precedent on the law of standing. This Court's decision in *Coit* was merely a summary affirmance; for that reason alone it could hardly establish principles contrary to those set out in opinions issued after full briefing and argument. See *Fusari* v. *Steinberg*, 419 U. S. 379, 392 (1975) (BURGER, C. J., concurring); see also *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 74 (1976). Moreover, when the case reached this Court, the plaintiffs and the IRS were no longer adverse parties; and the ruling that was summarily affirmed, *Green* v. *Connally*, 330 F. Supp. 1150 (DC 1971), did not include a ruling on the issue of standing, which had been briefly considered in a prior ruling of the District Court, *Green* v. *Kennedy*, 309 F. Supp. 1127, 1132 (DC), appeal dism'd *sub nom. Cannon* v. *Green*, 398 U. S. 956 (1970). Thus, "the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy." *Bob Jones University* v. *Simon*, 416 U. S. 725, 740, n. 11 (1974).

In any event, the facts in the *Coit* case are sufficiently different from those presented in this lawsuit that the absence of standing here is unaffected by the possible propriety of standing there. In particular, the suit in *Coit* was limited to the public schools of one State. Moreover, the District Court found, based on extensive evidence before it as well as on the findings in *Coffey* v. *State Educational Finance Comm'n*, 296 F. Supp. 1389 (SD Miss. 1969), that large numbers of segregated private schools had been established in the State for the purpose of avoiding a unitary public school system, 309 F. Supp., at 1133–1134; that the tax exemptions were critically important to the ability of such schools to succeed, *id.*, at 1134–1136; and that the connection between the grant of tax exemptions to discriminatory schools and desegregation of the public schools in the particular State was close enough to warrant the conclusion that irreparable injury to the interest in desegregated education was threatened if the tax exemptions continued, *id.*, at 1138–1139.[29] What made possible those findings was the fact that, when the Mississippi plaintiffs filed their suit, the IRS had a policy of granting tax exemptions to racially discriminatory private schools; thus, the suit was initially brought, not simply to reform Executive Branch enforcement procedures, but to challenge a fundamental IRS policy decision, which affected numerous identifiable schools in the State of Mississippi. See *id.*, at 1130.[30]

The limited setting, the history of school desegregation in Mississippi at the time of the *Coit* litigation, the nature of the IRS conduct challenged at the outset of the litigation, and the District Court's particular findings, which were never challenged as clearly erroneous, see Motion to Dismiss or Affirm in *Coit* v. *Green*, O. T. 1971, No. 71–425, p. 13, amply distinguish the *Coit* case from respondents' lawsuit. Thus, we need not consider whether standing was properly found to exist in *Coit*. Whatever the answer to that question, respondents' complaint, which aims at nationwide relief and does not challenge particular identified unlawful IRS actions, alleges no connection between the asserted desegregation injury and the challenged IRS conduct direct enough to overcome the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures.

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[29] In *Norwood* v. *Harrison*, 413 U. S. 455, 467, n. 9 (1973), this Court described the experience of one county in Mississippi: "all white children were withdrawn from public schools and placed in a private academy housed in local church facilities and staffed by the principal and 17 high school teachers of the county system, who resigned in mid-year to accept jobs at the new academy." The Court observed that similar histories in various other localities in Mississippi were recited by the plaintiffs without challenge. *Ibid.*

[30] The relatively simple either-or nature of the challenged decision affects the extent to which the initial complaint implicated separation of powers concerns. When the IRS altered its policy concerning the grant of tax exemptions to racially discriminatory schools, see *Green* v. *Connally*, 330 F. Supp., at 1156, the plaintiffs were left with an action more closely resembling this lawsuit. We have no occasion to consider here the effect on a plaintiff's standing of a defendant's partial cessation of challenged conduct when that partial cessation leaves the plaintiff with a complaint presenting substantially greater uncertainty about standing than the initial complaint did.

## III

"The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 39. Respondents have not met this fundamental requirement. The judgment of the Court of Appeals is accordingly reversed, and the injunction issued by that court is vacated.

*It is so ordered.*

JUSTICE MARSHALL took no part in the decision of these cases.

JUSTICE BRENNAN, dissenting.

Once again, the Court "uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 490 (1982) (BRENNAN, J., dissenting) (quoting *Barlow* v. *Collins*, 397 U. S. 159, 178 (1970) (BRENNAN, J., concurring in result and dissenting)). And once again, the Court does so by "wax[ing] eloquent" on considerations that provide little justification for the decision at hand. See 454 U. S., at 491. This time, however, the Court focuses on "the idea of separation of powers," *ante*, at 750, 752, 759, 761, as if the mere incantation of that phrase provides an obvious solution to the difficult questions presented by these cases.

One could hardly dispute the proposition that Art. III of the Constitution, by limiting the judicial power to "Cases" or "Controversies," embodies the notion that each branch of our National Government must confine its actions to those that are consistent with our scheme of separated powers. But simply stating that unremarkable truism provides little, if any, illumination of the standing inquiry that must be undertaken by a federal court faced with a particular action filed by particular plaintiffs. "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." *Flast* v. *Cohen*, 392 U. S. 83, 100 (1968).

The Court's attempt to obscure the standing question must be seen, therefore, as no more than a cover for its failure to recognize the nature of the specific claims raised by the respondents in these cases. By relying on generalities concerning our tripartite system of government, the Court is able to conclude that the respondents lack standing to maintain this action without acknowledging the precise nature of the injuries they have alleged. In so doing, the Court displays a startling insensitivity to the historical role played by the federal courts in eradicating race discrimination from our Nation's schools—a role that has played a prominent part in this Court's decisions from *Brown* v. *Board of Education*, 347 U. S. 483 (1954), through *Bob Jones University* v. *United States*, 461 U. S. 574 (1983). Because I cannot join in such misguided decisionmaking, I dissent.

## I

The respondents, suing individually and on behalf of their minor children, are parents of black children attending public schools in various school districts across the Nation. Each of these school districts, the respondents allege,[1] was once segregated and is now in the process of desegregating pursuant to court order, federal regulations or guidelines, state law, or voluntary agreement. Moreover, each contains one or more private schools that discriminate against black schoolchildren and that operate with the assistance of tax exemptions unlawfully granted to them by the Internal Revenue Service (IRS). See Complaint ¶¶24–48, App. 26–38.

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[1] Because the District Court granted a motion to dismiss, see *Wright* v. *Miller*, 480 F. Supp. 790, 793 (DC 1979), we must "'accept as true all mate-

To eliminate this federal financial assistance for discriminating schools, the respondents seek a declaratory judgment that current IRS practices are inadequate both in identifying racially discriminatory schools and in denying requested tax exemptions or revoking existing exemptions for any schools so identified. In particular, they allege that existing IRS guidelines permit schools to receive tax exemptions simply by adopting and certifying—but not implementing—a policy of nondiscrimination. Pursuant to these ineffective guidelines,[2] many private schools that discriminate on the basis of

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rial allegations of the complaint, and . . . construe the complaint in favor of the complaining party.'" *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 109 (1979) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975)). See 441 U. S., at 112. Cf. *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957).

[2] As I have recognized in n. 1, *supra*, we must accept as true the factual allegations made by the respondents. It nonetheless should be noted that significant evidence exists to support the respondents' claim that the IRS guidelines are ineffective. Indeed, the Commissioner of Internal Revenue admitted as much in testimony before the Congress:

"This litigation prompted the Service once again to review its procedures in this area. It focused our attention on the adequacy of existing policies and procedures as we moved to formulate a litigation position. *We concluded that the Service's procedures were ineffective in identifying schools which in actual operation discriminate against minority students*, even though the schools may profess an open enrollment policy and comply with the yearly publication requirements of Revenue Procedure 75–50.

. . . . .

"A clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory. *This position is indefensible*. Just last year the U. S. Commission on Civil Rights race continue to benefit illegally from their tax-exempt status and the resulting charitable deductions granted to taxpayers who contribute to such schools. The respondents therefore seek a permanent injunction requiring the IRS to deny tax exemptions to any private schools

> "which have insubstantial or non-existent minority enrollments, which are located in or serve desegregating school districts, and which either—
>
> > "(a) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;
> >
> > "(b) have been determined in adversary judicial or administrative proceedings to be racially segregated; or
> >
> > "(c) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems." Complaint ¶4, App. 19.

This requested relief is substantially similar to the enforcement guidelines promulgated by the IRS itself in 1978 and 1979, before congressional action temporarily stayed, and the agency withdrew, the amended procedures. See 44 Fed. Reg. 9451 (1979); 43 Fed. Reg. 37296 (1978). Cf. *ante*, at 747, and nn. 15–16.

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criticized the Service's enforcement in this area as inadequate, emphasizing the continuing tax exemption of such adjudicated schools." Tax-Exempt Status of Private Schools: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess., 5 (1979) (statement of Jerome Kurtz, Commissioner of Internal Revenue) (emphasis added).

See also *id.*, at 236–251 (letter and memorandum from U. S. Commission on Civil Rights criticizing IRS enforcement policies); *id.*, at 1181–1182, 1187–1191 (statement and letter from Civil Rights Division of the Department of Justice criticizing IRS guidelines).

## II

Persons seeking judicial relief from an Art. III court must have standing to maintain their cause of action. At a minimum, the standing requirement is not met unless the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . ." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Under the Court's cases, this "personal stake" requirement is satisfied if the person seeking redress has suffered, or is threatened with, some "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), and if there is some causal connection between the asserted injury and the conduct being challenged, *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41 (1976). See *Heckler* v. *Mathews*, 465 U. S. 728, 738 (1984); *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 376 (1982); *Valley Forge*, 454 U. S., at 472.

### A

In these cases, the respondents have alleged at least one type of injury that satisfies the constitutional requirement of "distinct and palpable injury."[3] In particular, they claim that the IRS's grant of tax-exempt status to racially discriminatory private schools directly injures their children's opportunity and ability to receive a desegregated education. As the complaint specifically alleges, the IRS action being challenged

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[3] Because I conclude that the second injury alleged by the respondents is sufficient to satisfy constitutional requirements, I do not need to reach what the Court labels the "stigmatic injury." See *ante*, at 754–756, and n. 22. I note, however, that the Court has mischaracterized this claim of injury by misreading the complaint filed by the respondents. In particular, the respondents have not simply alleged that, as blacks, they have suffered the denigration injury "suffered by all members of a racial group when the Government discriminates on the basis of race." *Ante*, at 754. Rather, the complaint, fairly read, limits the claim of stigmatic injury from illegal governmental action to black children attending public schools in districts that are currently desegregating yet contain discriminatory private schools benefiting from illegal tax exemptions. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U. S., at 377 (injury from racial steering practices confined to "relatively compact neighborhood[s]"). Thus, the Court's "parade of horribles" concerning black plaintiffs from Hawaii challenging tax

> "fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems." Complaint ¶50(b), App. 39.

The Court acknowledges that this alleged injury is sufficient to satisfy constitutional standards. See *ante,* at 756. It does so only grudgingly, however, without emphasizing the significance of the harm alleged. Nonetheless, we have consistently recognized throughout the last 30 years that the deprivation of a child's right to receive an education in a desegregated school is a harm of special significance; surely, it satisfies any constitutional requirement of injury in fact. Just last Term in *Bob Jones University* v. *United States,* for example, we acknowledged that "[a]n unbroken line of cases following *Brown* v. *Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, *as well as rights of individuals.*" 461 U. S., at 593 (1983) (emphasis added). See *Gilmore* v. *City of Montgomery,* 417 U. S. 556, 568 (1974) ("[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and

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exemptions granted to schools in Maine, see *ante,* at 756, is completely irrelevant for purposes of Art. III standing in this action. Indeed, even if relevant, that criticism would go to the scope of the class certified or the relief granted in the lawsuit, issues that were not reached by the District Court or the Court of Appeals and are not now before this Court.

directly . . ., nor nullified indirectly . . . through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'") (quoting *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958)); *Norwood* v. *Harrison*, 413 U. S. 455, 468–469 (1973). "The right of a student not to be segregated on racial grounds in schools . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper* v. *Aaron*, *supra*, at 19; *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

In the analogous context of housing discrimination, the Court has similarly recognized that the denial of an opportunity to live in an integrated community is injury sufficient to satisfy the constitutional requirements of standing. In particular, we have recognized that injury is properly alleged when plaintiffs claim a deprivation "of the social and professional benefits of living in an integrated society." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 111–112 (1979). See also *Havens Realty Corp.* v. *Coleman*, *supra*, at 376, and n. 17; *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972). Noting "the importance of the 'benefits [obtained] from interracial associations,'" as well as the oft-stated principle "that noneconomic injuries may suffice to provide standing," we have consistently concluded that such an injury is "sufficient to satisfy the constitutional standing requirement of actual or threatened harm." *Gladstone, Realtors*, *supra*, at 112 (quoting *Trafficante*, *supra*, at 210, and citing *Sierra Club* v. *Morton*, 405 U. S. 727, 734–735 (1972)).

There is, of course, no rational basis on which to treat children who seek to be educated in desegregated school districts any differently for purposes of standing than residents who seek to live in integrated housing communities. Indeed, if anything, discriminatory practices by private schools, which "exer[t] a pervasive influence on the entire educational process," *Norwood*, *supra*, at 469 (citing *Brown* v. *Board of Education*, *supra*, and quoted in *Bob Jones University*, *supra*, at

595), have been more readily recognized to constitute injury redressable in the federal courts. It is therefore beyond peradventure that the denial of the benefits of an integrated education alleged by the respondents in these cases constitutes "distinct and palpable injury."

### B

Fully explicating the injury alleged helps to explain why it is fairly traceable to the governmental conduct challenged by the respondents. As the respondents specifically allege in their complaint:

> "Defendants have fostered and encouraged the development, operation and expansion of many of these racially segregated private schools by recognizing them as 'charitable' organizations described in Section 501(c)(3) of the Internal Revenue Code, and exempt from federal income taxation under Section 501(a) of the Code. Once the schools are classified as tax-exempt . . ., contributions made to them are deductible from gross income on individual and corporate income tax returns. . . . Moreover, [the] organizations . . . are also exempt from federal social security taxes . . . and from federal unemployment taxes . . . . The resulting exemptions and deductions provide tangible financial aid and other benefits which support the operation of racially segregated private schools. In particular, the resulting deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts. Additionally, the existence of a federal tax exemption amounts to a federal stamp of approval which facilitates fund raising on behalf of racially segregated private schools. Finally, by supporting the development, operation and expansion of institutions providing racially segregated educational opportunites

> for white children avoiding attendance in desegregating public schools, defendants are thereby interfering with the efforts of courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems." Complaint ¶21, App. 24.[4]

Viewed in light of the injuries they claim, the respondents have alleged a direct causal relationship between the Government action they challenge and the injury they suffer: their inability to receive an education in a racially integrated school is directly and adversely affected by the tax-exempt status granted by the IRS to racially discriminatory schools in their respective school districts. Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools.

The Court admits that "[t]he diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions . . . if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration," but concludes that "[r]espondents have made no such allegation." *Ante*, at 758. With all due respect, the Court has either misread the complaint or is improperly requiring the respondents to prove their case on the merits in order to defeat a motion to dismiss.[5] For example, the respondents specifically refer by name to at least 32 private schools that discriminate on the basis of race and yet continue to benefit illegally from tax-exempt status. Eighteen of those schools—including at least 14 elementary schools, 2 junior high schools, and 1 high school—are located in the city of Memphis, Tenn., which has been the subject of several court orders to desegregate. See Complaint ¶¶24–27, 45, App. 26–27, 35–36. Similarly, the respondents cite two private schools in Orangeburg, S. C. that continue to benefit from federal tax exemptions even though they practice race discrimination in school districts that are desegregating pursuant to judicial and administrative orders. See Complaint ¶¶29, 46, App. 28, 36. At least with respect to these school districts, as well as the others specifically mentioned in the complaint, there can be little doubt that the respondents have identified communities containing "enough racially discriminatory private schools receiving tax exemptions . . . to make an appreciable difference in public school integration," *ante*, at 758.[6]

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[4] The substance of these allegations is also summarized in ¶2 of the complaint:

"Contrary to law and their public responsibility, defendants have fostered and encouraged the development, operation and expansion of these racially segregated private schools by granting them, or the organizations that operate them, exemptions from federal income taxation . . . . Defendants have thereby ensured that these private schools will be exempt from federal income taxation, and that contributions to them will be deductible by corporate and individual donors for federal tax purposes. These federal tax benefits are important to the financial well-being of private segregated schools and significantly support their development, operation and expansion. Moreover, by facilitating the development, operation and expansion of racially segregated schools which provide alternative educational opportunities for white children avoiding attendance in desegregating public school systems, defendants are thereby interfering with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have operated racially dual school systems." App. 17–18.

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[5] The Court's confusion is evident from note 23 of its opinion, *ante*, at 758. The Court claims that "none of [the schools] alleged to be directly receiving a tax exemption is alleged to be racially discriminatory." This is directly contradicted not only by the plain language of the complaint, see Complaint ¶¶2, 22, App. 17–18, 25, but also by the Court's earlier concession that the respondents' complaint alleges "grants of tax-exempt status to . . . racially discriminatory private schools in desegregating districts," *ante*, at 745, n. 11.

[6] Even if the Court were correct in its conclusion that there is an insufficient factual basis alleged in the complaint, the proper disposition would be

Moreover, the Court has previously recognized the existence, and constitutional significance, of such direct relationships between unlawfully segregated school districts and government support for racially discriminatory private schools in those districts. In *Norwood* v. *Harrison*, 413 U. S. 455 (1973), for example, we considered a Mississippi program that provided textbooks to students attending both public and private schools, without regard to whether any participating school had racially discriminatory policies. In declaring that program constitutionally invalid, we noted that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Id.*, at 465. We then spoke directly to the causal relationship between the financial aid provided by the state textbook program and the constitutional rights asserted by the students and their parents:

> "The District Court laid great stress on the absence of a showing by appellants that 'any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools.' . . . *We do not agree with the District Court in its analysis of the legal consequences of this uncertainty, for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.*" *Id.*, at 465–466 (citations omitted) (emphasis added).

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to remand in order to afford the respondents an opportunity to amend their complaint. See *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 377–378 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 55, n. 6 (1976) (BRENNAN, J., concurring in judgment). Cf. Fed. Rule Civ. Proc. 12(e).

Thus, *Norwood* explicitly stands for the proposition that governmental aid to racially discriminatory schools is a direct impediment to school desegregation.

The Court purports to distinguish *Norwood* from the present litigation because "'[t]he plaintiffs in *Norwood* were parties to a school desegregation order'" and therefore "had acquired a right to have the State 'steer clear' of any perpetuation of the racially dual school system that it had once sponsored," *ante*, at 763 (quoting *Gilmore* v. *City of Montgomery*, 417 U. S., at 571, n. 10, and *Norwood*, *supra*, at 467), whereas the "[r]espondents in this lawsuit . . . have no injunctive rights against the IRS that are allegedly being harmed," *ante*, at 763. There is nothing to suggest, however, that the relevant injunction in *Norwood* was anything more than an order to desegregate the schools in Tunica County, Miss.[7] Given that many of the school districts identified in the respondents' complaint have also been the subject of court-ordered integration, the standing inquiry in these cases should not differ. And, although the respondents do not specifically allege that they are named parties to any outstanding desegregation orders, that is undoubtedly due to the passage of time since the orders were issued, and not to any difference in the harm they suffer.

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[7] In particular, the plaintiffs in *Norwood*, suing on behalf of a statewide class of black students, characterized the basis for their standing as follows:

"The named plaintiffs . . . are black citizens of the United States residing in Tunica County, Mississippi. They are students in attendance at the public schools of the Tunica County School District. Their right to a racially integrated and otherwise nondiscriminatory public school system, vindicated by order of [the District Court] dated January 23, 1970 [*United States and Driver* v. *Tunica County School District*, Civil Action Nos. DC 6718 and 7013], and their right to the elimination of state support for racially segregated schools, has been frustrated and/or abridged by the creation of the racially segregated Tunica County Institute of Learning and the policies and practices of defendants as set forth below." App. 20 and Brief for United States as *Amicus Curiae* in *Norwood* v. *Harrison*, O. T. 1972, No. 72–77, p. 5.

For the reasons explained in the text, I find these allegations legally indistinguishable from the allegations in the present litigation.

Even accepting the relevance of the Court's distinction, moreover, that distinction goes to the injury suffered by the respective plaintiffs, and not to the causal connection between the harm alleged and the governmental action challenged. Cf. *ante*, at 756 (conceding that the respondents have alleged constitutionally sufficient harm in these cases). The causal relationship existing in *Norwood* between the alleged harm (*i. e.*, interference with the plaintiffs' injunctive rights to a desegregated school system) and the challenged governmental action (*i. e.*, free textbooks provided to racially discriminatory schools) is indistinguishable from the causal relationship existing in the present cases, unless the Court intends to distinguish the lending of textbooks from the granting of tax-exempt status. The Court's express statement on causation in *Norwood* therefore bears repeating: "the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." 413 U. S., at 465–466. See Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 Harv. L. Rev. 378, 385–386 (1979).[8]

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[8] Our subsequent decision in *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974), heavily relied on our decision in *Norwood*. In *Gilmore*, we considered a challenge to a city policy that permitted racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities. In affirming an injunction against exclusive access to such facilities, we noted:

"Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. '[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."' This means that any tangible

Similarly, although entitled to less weight than a decision after full briefing and oral argument on the merits, see *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 74 (1976), our summary affirmance in *Coit* v. *Green*, 404 U. S. 997 (1971), summarily aff'g *Green* v. *Connally*, 330 F. Supp. 1150 (DC), is directly relevant to the standing of the respondents in this litigation. The plaintiffs in *Coit* v. *Green* were black parents of minor children attending public schools in desegregating school districts. Like the respondents in these cases, the plaintiffs charged that the IRS had failed to confine tax-exempt status to private schools that were not racially discriminatory. And like the present respondents, they sought new IRS procedures as their exclusive remedy.

The three-judge District Court expressly concluded that the plaintiffs had standing to maintain their action:

> "This case is properly maintained as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, by Negro school children in Mississippi and the parents of those children on behalf of themselves and all persons similarly situated. They have standing to attack the constitutionality of statutory provisions which they claim provid[e] an unconstitutional system of benefits and

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state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.' The constitutional obligation of the State 'requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.'" 417 U. S., at 568–569 (citations omitted).

The Court notes that the case in *Gilmore* was remanded to the District Court for development of a more particularized record to ensure that the nonexclusive use of the city's parks "'would result in cognizable injury to these plaintiffs.'" *Ante*, at 763, n. 28 (quoting *Gilmore*, *supra*, at 570–571, n. 10). At most, however, this simply suggests that a remand for more particularized pleadings is the proper disposition in the present litigation. Cf. n. 6, *supra*. The Court is therefore no more faithful to the procedures followed in *Gilmore* than it is to the substance of that decision.

> matching grants that fosters and supports a system of segregated private schools as an alternative available to white students seeking to avoid desegregated public schools. We follow the precedent on this point of the three-judge District Court for the Southern District of Mississippi in Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (1969)." *Green* v. *Kennedy*, 309 F. Supp. 1127, 1132 (DC), appeal dism'd *sub nom. Cannon* v. *Green*, 398 U. S. 956 (1970).

When the case was properly appealed to this Court, the standing issue was expressly raised in the jurisdictional statement filed by intervenor Coit, on behalf of a class of parents and children who supported or attended all-white private schools. Juris. Statement, O. T. 1971, No. 71–425, p. 11. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 63, and n. 11 (BRENNAN, J., concurring in judgment). Nonetheless, the Court summarily affirmed, *Coit* v. *Green*, *supra*, thereby indicating our agreement with the District Court's conclusion.[9] See also *Griffin* v. *County*

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[9] The Court's discussion of our summary affirmance in *Coit* v. *Green* simply stretches the imagination beyond its breaking point. The Court concludes that "[t]he limited setting, the history of school desegregation in Mississippi at the time of the *Coit* litigation, the nature of the IRS conduct challenged at the outset of the litigation, and the District Court's particular findings . . . amply distinguish the *Coit* case from respondents' lawsuit." *Ante*, at 765. With all due respect, none of these criteria should be relevant to the determination of standing in these cases.

First, although the *Coit* litigation was limited to the State of Mississippi, that relates solely to the scope of a properly certified class, and not to the standing of class members to maintain their action. Cf. n. 3, *supra*. Second, although the District Court made extensive findings concerning the importance of tax exemptions to the discriminatory schools involved in the *Coit* litigation, that only helps to prove the truth of the allegations made by the respondents in these cases. It also demonstrates why the respondents should be given either an opportunity to prove their case on the merits or an opportunity to amend their pleadings with more particularized allegations. Cf. nn. 6, 8, *supra*. Because the respondents in this litigation have never had their day in court, the Court's use of the specific findings

*School Board of Prince Edward County*, 377 U. S. 218, 224 (1964).

Given these precedents, the Court is forced to place primary reliance on our decision in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*. In that case, the Court denied standing to plaintiffs who challenged an IRS Revenue Ruling that granted charitable status to hospitals even though they failed to operate to the extent of their financial ability when refusing medical services for indigent patients. The Court found that the injury alleged was not one "that fairly can be traced to the challenged action of the defendant." *Id.*, at 41. In particular, it was "purely speculative" whether the denial of access to hospital services alleged by the plaintiffs fairly could be traced to the Government's grant of tax-exempt status to the relevant hospitals, primarily because the hospitals were likely making their service decisions without regard to the tax implications. *Id.*, at 42–43.

Even accepting the correctness of the causation analysis included in that decision, however, it is plainly distinguishable from the cases at hand. The respondents in these cases do not challenge the denial of any service by a tax-exempt

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made in the *Coit* litigation to deny the respondents standing in this litigation makes a mockery of the standing inquiry. Third, although it is correct that, before the *Coit* litigation, the IRS initially followed a policy of granting tax exemptions to racially discriminatory schools, that should have no bearing on the respondents' standing in these cases; indeed, the respondents have alleged that the current IRS enforcement policy is so ineffective as to be the functional equivalent of the Government's policy prior to the *Coit* litigation. See *supra*, at 768, and n. 2. Finally, if the "history of school desegregation in Mississippi at the time of the *Coit* litigation" is at all relevant to the standing inquiry, it weighs in favor of allowing the respondents to maintain their present lawsuit. From the perspective of black children attending desegregating public schools, and according to the allegations included in their complaint, current IRS policies toward racially discriminatory private schools represent a substantial continuation of the onerous history of school desegregation in the affected school districts. With all respect, therefore, the Court has simply failed to distinguish these cases from our summary affirmance in *Coit* v. *Green*.

institution; admittedly, they do not seek access to racially discriminatory private schools. Rather, the injury they allege, and the injury that clearly satisfies constitutional requirements, is the deprivation of their children's opportunity and ability to receive an education in a racially integrated school district. See *supra*, at 770–773. This injury, as the Court admits, *ante*, at 757–758, and as we have previously held in *Norwood* v. *Harrison*, 413 U. S., at 465–466, is of a kind that is directly traceable to the governmental action being challenged. The relationship between the harm alleged and the governmental action cannot simply be deemed "purely speculative," as was the causal connection at issue in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 42. Indeed, as I have previously explained, *supra*, at 773–778, the Court's conclusion to the contrary is based on a unjustifiably narrow reading of the respondents' complaint and an indefensibly limited interpretation of our holding in *Norwood*. By interposing its own version of pleading formalities between the respondents and the federal courts, the Court not only has denied access to litigants who properly seek vindication of their constitutional rights, but also has ignored the important historical role that the courts have played in the Nation's efforts to eliminate racial discrimination from our schools.

## III

More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims.[10] The Court today does nothing to avoid that criticism. What is most disturbing about today's decision, therefore, is not the standing analysis applied, but the indifference evidenced by the Court to the detrimental effects that racially segregated schools, supported by tax-exempt status from the Federal Government, have on the respondents' attempt to obtain an education in a racially integrated school system. I cannot join such indifference, and would give the respondents a chance to prove their case on the merits.

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[10] See, *e. g.*, L. Tribe, American Constitutional Law § 3–21 (1978); Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 1, 14–22 (1982); Nichol, Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 Ky. L. J. 185 (1980–1981); Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663 (1977).

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Three propositions are clear to me: (1) respondents have adequately alleged "injury in fact"; (2) their injury is fairly traceable to the conduct that they claim to be unlawful; and (3) the "separation of powers" principle does not create a jurisdictional obstacle to the consideration of the merits of their claim.

## I

Respondents, the parents of black schoolchildren, have alleged that their children are unable to attend fully desegregated schools because large numbers of white children in the areas in which respondents reside attend private schools which do not admit minority children. The Court, JUSTICE BRENNAN, and I all agree that this is an adequate allegation of "injury in fact." The Court is quite correct when it writes:

> "The injury they identify—their children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases from *Brown* v. *Board of Education*, 347 U. S. 483 (1954), to *Bob Jones University* v. *United States*, 461 U. S. 574 (1983), one of the most serious injuries recognized in our legal system." *Ante*, at 756.

This kind of injury may be actionable whether it is caused by the exclusion of black children from public schools or by an official policy of encouraging white children to attend nonpublic schools. A subsidy for the withdrawal of a white child can have the same effect as a penalty for admitting a black child.

## II

In final analysis, the wrong respondents allege that the Government has committed is to subsidize the exodus of white children from schools that would otherwise be racially integrated. The critical question in these cases, therefore, is whether respondents have alleged that the Government has created that kind of subsidy.

In answering that question, we must of course assume that respondents can prove what they have alleged. Furthermore, at this stage of the litigation we must put to one side all questions about the appropriateness of a nationwide class action.[1] The controlling issue is whether the causal connection between the injury and the wrong has been adequately alleged.

An organization that qualifies for preferential treatment under § 501(c)(3) of the Internal Revenue Code, because it is "operated exclusively for . . . charitable . . . purposes," 26

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[1] The question whether respondents have adequately alleged their standing must be separated from the question whether they can prove what has been alleged. It may be that questions concerning the racial policies of given schools, and the impact of their tax treatment on enrollment, vary widely from school to school, making inappropriate the nationwide class described in respondents' complaint. A case in which it was proved that a segregated private school opened just as a nearby public school system began desegregating pursuant to court order, that the IRS knew the school did not admit blacks, and that the school prospered only as a result of favorable tax treatment, might be very different from one in which the plaintiff attempted to prove a nationwide policy and its effect. However, as JUSTICE BRENNAN observes, *ante*, at 770–771, n. 3, 780–781, n. 9, that goes to whether respondents can prove the nationwide policy they have alleged, and whether the factual issues they raise are sufficiently national in scope to justify the certification of a nationwide class. I rather doubt that a nationwide class would be appropriate, but at this stage respondents' allegations of injury must be taken as true, see *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), and hence we must assume that respondents can prove the existence of a nationwide policy and its alleged effects.

U. S. C. § 501(c)(3), is exempt from paying federal income taxes, and under § 170 of the Code, 26 U. S. C. § 170, persons who contribute to such organizations may deduct the amount of their contributions when calculating their taxable income. Only last Term we explained the effect of this preferential treatment:

> "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions." *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540, 544 (1983) (footnote omitted).

The purpose of this scheme, like the purpose of any subsidy, is to promote the activity subsidized; the statutes "seek to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits." *Bob Jones University* v. *United States*, 461 U. S. 574, 587, n. 10 (1983). If the granting of preferential tax treatment would "encourage" private segregated schools to conduct their "charitable" activities, it must follow that the withdrawal of the treatment would "discourage" them, and hence promote the process of desegregation.[2]

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[2] Respondents' complaint is premised on precisely this theory. The complaint, in ¶¶ 39–48, describes a number of private schools which receive preferential tax treatment and which allegedly discriminate on the basis of race, providing white children with "a racially segregated alternative to attendance" in the public schools which respondents' children attend. The complaint then states:

"There are thousands of other racially segregated private schools which operate or serve desegregating public school districts and which function under the umbrella of organizations which have received, applied for, or will apply for, federal tax exemptions. Moreover, many additional public school districts will in the future begin desegregating pursuant to court order or [government] regulations and guidelines, under state law or vol-

We have held that when a subsidy makes a given activity more or less expensive, injury can be fairly traced to the subsidy for purposes of standing analysis because of the resulting increase or decrease in the ability to engage in the activity.[3] Indeed, we have employed exactly this causation analysis in the same context at issue here—subsidies given private schools that practice racial discrimination. Thus, in *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974), we easily recognized the causal connection between official policies that enhanced the attractiveness of segregated schools and the failure to bring about or maintain a desegregated public school system.[4] Similarly, in *Norwood* v. *Harrison*,

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untarily. Additional racially segregated private schools may be organized or expanded, many of which will be operated by organizations which have received, applied for, or will apply for federal tax exemptions. As in the case of those representative organizations and private schools described in paragraphs 39–48, *supra*, such organizations and schools provide, or will provide, white children with a racially segregated alternative to desegregating public schools. *By recognizing these organizations as exempt from federal taxation, defendants facilitate their development, operation and expansion and the provision of racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems. Defendants thereby also interfere with the efforts of federal courts, [the Federal Government] and local school authorities to eliminate racially dual school systems."* App. 38 (emphasis supplied).

Thus, like JUSTICE BRENNAN, *ante*, at 774–775, I do not understand why the Court states that the complaint contains no allegation that the tax benefits received by private segregated schools "make an appreciable difference in public school integration," *ante*, at 758, unless the Court requires "intricacies of pleading that would have gladdened the heart of Baron Parke." Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1305 (1976).

[3] See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 74–78 (1978); *United States* v. *SCRAP*, 412 U. S. 669, 687–689 (1973); see also *Barlow* v. *Collins*, 397 U. S. 159 (1970).

[4] We agreed with the District Court's following reasoning:

"Montgomery officials were under an affirmative duty to bring about and to maintain a desegregated public school system. Providing recreational facilities to *de facto* or *de jure* segregated private schools was inconsistent with that duty because such aid enhanced the attractiveness of those

413 U. S. 455 (1973), we concluded that the provision of textbooks to discriminatory private schools "has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.*, at 466.

The Court itself appears to embrace this reading of *Gilmore* and *Norwood.* It describes *Gilmore* as holding that a city's policy of permitting segregated private schools to use public parks "would impede the integration of the public schools. Exclusive availability of the public parks 'significantly enhanced the attractiveness of segregated private schools . . . by enabling them to offer complete athletic programs.'" *Ante*, at 762, n. 27 (quoting 417 U. S., at 569). It characterizes *Norwood* as having concluded that the provision of textbooks to such schools would impede court-ordered desegregation. *Ante*, at 763. Although the form of the subsidy for segregated private schools involved in *Gilmore* and *Norwood* was different from the "cash grant" that flows from a tax exemption, the economic effect and causal connection between the subsidy and the impact on the complaining litigants was precisely the same in those cases as it is here.

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schools, generated capital savings that could be used to improve their private educational offerings, and provided means to raise other revenue to support the institutions, all to the detriment of establishing the constitutionally mandated unitary public school system." 417 U. S., at 563. We went on to write:

"Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. '[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."' This means that any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'" *Id.*, at 568 (quoting *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958), and *Norwood* v. *Harrison*, 413 U. S. 455, 466 (1973)).

This causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased. Sections 170 and 501(c)(3) are premised on that recognition. If racially discriminatory private schools lose the "cash grants" that flow from the operation of the statutes, the education they provide will become more expensive and hence less of their services will be purchased. Conversely, maintenance of these tax benefits makes an education in segregated private schools relatively more attractive, by decreasing its cost. Accordingly, without tax-exempt status, private schools will either not be competitive in terms of cost, or have to change their admissions policies, hence reducing their competitiveness for parents seeking "a racially segregated alternative" to public schools, which is what respondents have alleged many white parents in desegregating school districts seek.[5] In either event the process of desegregation will be advanced in the same way that it was advanced in *Gilmore* and *Norwood*—the withdrawal of the subsidy for segregated schools means the incentive structure facing white parents who seek such schools for their children will be altered. Thus, the laws of economics, not to mention the laws of Congress embodied in §§170 and 501(c)(3), compel the conclusion that the injury respondents have alleged—the increased segregation of their children's schools because of the ready availability of private schools that admit whites only—will be redressed if these schools' operations are inhibited through the denial of preferential tax treatment.[6]

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[5] It is this "racially segregated alternative" to public schools—the availability of schools that "receive tax exemptions merely on the basis of adopting and certifying—but not implementing—a policy of nondiscrimination," App. 17–18, which respondents allege white parents have found attractive, see *id.*, at 23–24, and which would either lose their cost advantage or their character as a segregated alternative if denied tax-exempt status because of their discriminatory admissions policies.

[6] This causation analysis explains the holding in the case on which the Court chiefly relies, *Simon* v. *Eastern Kentucky Welfare Rights Organiza-*

## III

Considerations of tax policy, economics, and pure logic all confirm the conclusion that respondents' injury in fact is fairly traceable to the Government's allegedly wrongful conduct. The Court therefore is forced to introduce the concept of "separation of powers" into its analysis. The Court writes that the separation of powers "explains why our cases preclude the conclusion" that respondents' injury is fairly traceable to the conduct they challenge. *Ante*, at 759.

The Court could mean one of three things by its invocation of the separation of powers. First, it could simply be expressing the idea that if the plaintiff lacks Art. III standing to bring a lawsuit, then there is no "case or controversy"

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*tion*, 426 U. S. 26 (1976). There, the plaintiffs—indigent persons in need of free medical care—alleged that they were harmed by the Secretary of the Treasury's decision to permit hospitals to retain charitable status while offering a reduced level of free care. However, while here the source of the causal nexus is the price that white parents must pay to obtain a segregated education, which is inextricably intertwined with the school's tax status, in *Simon* the plaintiffs were seeking free care, which hospitals could decide not to provide for any number of reasons unrelated to their tax status. See *id.*, at 42–43, and n. 23. Moreover, in *Simon*, the hospitals had to spend money in order to obtain charitable status. Therefore, they had an economic incentive to forgo preferential treatment. As the Court observed:

> "It is equally speculative whether the desired exercise of the Court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services. . . . [C]onflicting evidence supports the commonsense proposition that the dependence upon special tax benefits may vary from hospital to hospital." *Id.*, at 43.

In contrast, the tax benefits private schools receive here involve no "financial drain" since the schools need not provide "uncompensated services" in order to obtain preferential tax treatment. Thus, the economic effect of the challenged tax treatment in these cases is not "speculative," as the Court concluded it was in *Simon*. Here the financial incentives run in only one direction.

within the meaning of Art. III and hence the matter is not within the area of responsibility assigned to the Judiciary by the Constitution. As we have written in the past, through the standing requirement "Art. III limit[s] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982) (quoting *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968)).[7] While there can be no quarrel with this proposition, in itself it provides no guidance for determining if the injury respondents have alleged is fairly traceable to the conduct they have challenged.

Second, the Court could be saying that it will require a more direct causal connection when it is troubled by the separation of powers implications of the case before it. That approach confuses the standing doctrine with the justiciability of the issues that respondents seek to raise. The purpose of the standing inquiry is to measure the plaintiff's stake in the outcome, not whether a court has the authority to provide it with the outcome it seeks:

> "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975) (emphasis in original) (quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962)).[8]

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[7] See also *Warth* v. *Seldin*, 422 U. S., at 498; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 222 (1974).

[8] See also *Los Angeles* v. *Lyons*, 461 U. S. 95, 101–102 (1983); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 72; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S., at 38; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S., at 220–221; *United States* v. *Richardson*, 418 U. S. 166, 179 (1974); *O'Shea*

Thus, the "'fundamental aspect of standing' is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated,'" *United States* v. *Richardson*, 418 U. S. 166, 174 (1974) (emphasis in original) (quoting *Flast*, 392 U. S., at 99). The strength of the plaintiff's interest in the outcome has nothing to do with whether the relief it seeks would intrude upon the prerogatives of other branches of government; the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing.[9] Imposing an undefined but clearly more rigorous standard for redressability for reasons unrelated to the causal nexus between the injury and the challenged conduct

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v. *Littleton*, 414 U. S. 488, 493–494 (1974); *Roe* v. *Wade*, 410 U. S. 113, 123 (1973); *Sierra Club* v. *Morton*, 405 U. S. 727, 731–732 (1972); *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968).

[9] The *Flast* Court made precisely this point:

"When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. *The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.* Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.'" *Id.*, at 100–101 (emphasis supplied) (citations omitted) (quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), and *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937)).

can only encourage undisciplined, ad hoc litigation, a result that would be avoided if the Court straightforwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.[10]

Third, the Court could be saying that it will not treat as legally cognizable injuries that stem from an administrative decision concerning how enforcement resources will be allocated. This surely is an important point. Respondents do seek to restructure the IRS's mechanisms for enforcing the legal requirement that discriminatory institutions not receive tax-exempt status. Such restructuring would dramatically affect the way in which the IRS exercises its prosecutorial discretion. The Executive requires latitude to decide how best to enforce the law, and in general the Court may well be correct that the exercise of that discretion, especially in the tax context, is unchallengeable.

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[10] The danger of the Court's approach is illustrated by its failure to provide any standards to guide courts in determining when it is appropriate to require a more rigorous redressability showing because of separation of powers concerns, or how redressability can be demonstrated in a case raising separation of power concerns. The only guidance the Court offers is that the separation of powers counsels against recognizing standing when the plaintiff "seek[s] a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Ante*, at 761. That cannot be an appropriate test; the separation of powers tolerates quite a bit of "restructuring" in order to eliminate the effects of racial segregation. For example, in *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), we held that the Fifth Amendment prohibits the Executive from maintaining a dual school system. We have subsequently made it clear that the courts have authority to restructure both school attendance patterns and curriculum when necessary to eliminate the effects of a dual school system. See, *e. g.*, *Columbus Board of Education* v. *Penick*, 443 U. S. 449 (1979); *Milliken* v. *Bradley*, 433 U. S. 267 (1977); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). At the same time, standing doctrine has never stood as a barrier to such "restructuring." In the seminal case of *Baker* v. *Carr*, 369 U. S. 186 (1962), the Court accorded voters standing to challenge population variations between electoral districts despite the fact that the legislative reapportionment sought would and eventually did have dramatic "restructuring" effects. Only two Terms ago, in *Watt* v. *Energy Action Educational Foundation*, 454 U. S. 151, 160–162 (1981), the Court accorded California standing to challenge the Secretary of the Interior's methods for accepting bids on oil and gas rights, despite the fact that this would affect the manner in which the Executive Branch discharged "[its] duty to 'take Care that the Laws are faithfully executed,'" *ante*, at 761.

However, as the Court also recognizes, this principle does not apply when suit is brought "to enforce specific legal obligations whose violation works a direct harm," *ante*, at 761. For example, despite the fact that they were challenging the methods used by the Executive to enforce the law, citizens were accorded standing to challenge a pattern of police misconduct that violated the constitutional constraints on law enforcement activities in *Allee* v. *Medrano*, 416 U. S. 802 (1974).[11] Here, respondents contend that the IRS is violating a specific constitutional limitation on its enforcement discretion. There is a solid basis for that contention. In *Norwood*, we wrote:

> "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." 413 U. S., at 467.

*Gilmore* echoed this theme:

> "[A]ny tangible State assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.' *Norwood* v. *Harrison*, 413 U. S. 455, 466 (1973). The constitutional obligation of the State 'requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial

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[11] See also *INS* v. *Delgado*, 466 U. S. 210, 217, n. 4 (1984).

or other invidious discrimination.' *Id.*, at 467." 417 U. S., at 568–569.

Respondents contend that these cases limit the enforcement discretion enjoyed by the IRS. They establish, respondents argue, that the IRS cannot provide "cash grants" to discriminatory schools through preferential tax treatment without running afoul of a constitutional duty to refrain from "giving significant aid" to these institutions. Similarly, respondents claim that the Internal Revenue Code itself, as construed in *Bob Jones*, constrains enforcement discretion.[12] It has been clear since *Marbury* v. *Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177. Deciding whether the Treasury has violated a specific legal limitation on its enforcement discretion does not intrude upon the prerogatives of the Executive, for in so deciding we are merely saying "what the law is." Surely the question whether the Constitution or the Code limits enforcement discretion is one within the Judiciary's competence, and I do not believe that the question whether the law, as enunciated in *Gilmore*, *Norwood*, and *Bob Jones*, imposes such an obligation upon the IRS is so insubstantial that respondents' attempt to raise it should be defeated for lack of subject-matter jurisdiction on the ground that it infringes the Executive's prerogatives.[13]

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[12] In *Bob Jones* we clearly indicated that the Internal Revenue Code not only permits but in fact requires the denial of tax-exempt status to racially discriminatory private schools:

"Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life,' *Walz* v. *Tax Comm'n*, 397 U. S. 664, 673 (1970), or should be encouraged by having all taxpayers share in their support by way of special tax status.

"There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct. That it may be seen as belated does not undermine its soundness. It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, which 'exer[t] a pervasive influence on the entire educational process.' *Norwood* v. *Harrison*, [413 U. S.], at 469. Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept discussed earlier, or within the congressional intent underlying § 170 and § 501(c)(3)." 461 U. S., at 595–596.

In short, I would deal with the question of the legal limitations on the IRS's enforcement discretion on its merits, rather than by making the untenable assumption that the granting of preferential tax treatment to segregated schools does not make those schools more attractive to white students and hence does not inhibit the process of desegregation. I respectfully dissent.

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[13] It has long been the rule that unless a claim is wholly insubstantial, it may not be dismissed for lack of subject-matter jurisdiction. See *Bell* v. *Hood*, 327 U. S. 678 (1946).

# SEGURA ET AL. *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-5298. Argued November 9, 1983—Decided July 5, 1984

Acting on information that petitioners probably were trafficking in cocaine from their apartment, New York Drug Enforcement Task Force agents began a surveillance of petitioners. Thereafter, upon observing petitioner Colon deliver a bulky package to one Parra at a restaurant parking lot, while petitioner Segura and one Rivudalla-Vidal visited inside the restaurant, the agents followed Parra and Rivudalla-Vidal to their apartment and stopped them. Parra was found to possess cocaine, and she and Rivudalla-Vidal were immediately arrested. After being advised of his constitutional rights, Rivudalla-Vidal admitted that he had purchased the cocaine from petitioner Segura and confirmed that petitioner Colon had made the delivery at the restaurant. Task Force agents were then authorized by an Assistant United States Attorney to arrest petitioners, and were advised that a search warrant for petitioners' apartment probably could not be obtained until the following day but that the agent should secure the premises to prevent destruction of evidence. Later that same evening, the agents arrested petitioner Segura in the lobby of petitioners' apartment building, took him to the apartment, knocked on the door, and, when it was opened by petitioner Colon, entered the apartment without requesting or receiving permission. The agents then conducted a limited security check of the apartment and in the process observed, in plain view, various drug paraphernalia. Petitioner Colon was then arrested, and both petitioners were taken into custody. Two agents remained in the apartment awaiting the warrant but because of "administrative delay" the search warrant was not issued until some 19 hours after the initial entry into the apartment. In the search pursuant to the warrant, the agents discovered, *inter alia*, cocaine and records of narcotics transactions. These items were seized, together with those observed during the security check. The District Court granted petitioners' pretrial motion to suppress all the seized evidence. The Court of Appeals held that the evidence discovered in plain view on the initial entry, but not the evidence seized during the warrant search, must be suppressed. Petitioners were subsequently convicted of violating federal drug laws, and the Court of Appeals affirmed.

*Held:*

1. The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later

discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Nardone* v. *United States*, 308 U. S. 338, 341. The exclusionary rule does not apply, however, if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *ibid.*, as, for example, where the police had an "independent source" for discovery of the evidence. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. Pp. 804–805.

2. Here, there was an independent source for the challenged evidence; the evidence was discovered during a search of petitioners' apartment pursuant to a valid warrant. The information on which the warrant was secured came from sources wholly unconnected with the initial entry and was known to the agents well before that entry. Hence, whether the initial entry was illegal or not is irrelevant to the admissibility of the evidence, and exclusion of the evidence is not warranted as derivative or as "fruit of the poisonous tree." Pp. 813–816.

697 F. 2d 300, affirmed.

BURGER, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V, and VI, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Part IV, in which O'CONNOR, J., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 817.

*Peter J. Fabricant* argued the cause for petitioners. With him on the briefs was *Paul E. Warburgh, Jr.*

*Deputy Solicitor General Frey* argued the cause for the United States. With him on the brief were *Solicitor General Lee, Assistant Attorney General Jensen,* and *Alan I. Horowitz.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.†

We granted certiorari to decide whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the entry into the residence.

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**Gene Reibman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

†JUSTICE WHITE, JUSTICE POWELL, and JUSTICE REHNQUIST join all but Part IV of this opinion.

## I

Resolution of this issue requires us to consider two separate questions: first, whether the entry and internal securing of the premises constituted an impermissible seizure of all the contents of the apartment, seen and unseen; second, whether the evidence first discovered during the search of the apartment pursuant to a valid warrant issued the day after the entry should have been suppressed as "fruit" of the illegal entry. Our disposition of both questions is carefully limited.

The Court of Appeals affirmed the District Court's holding that there were no exigent circumstances to justify the warrantless entry into petitioners' apartment. That issue is not before us, and we have no reason to question the courts' holding that that *search* was illegal. The ensuing interference with petitioners' possessory interests in their apartment, however, is another matter. On this first question, we conclude that, assuming that there was a *seizure* of all the contents of the petitioners' apartment when agents secured the premises from within, that seizure did not violate the Fourth Amendment. Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.[1]

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[1] See Griswold, Criminal Procedure, 1969—Is It a Means or an End?, 29 Md. L. Rev. 307, 317 (1969); see generally 2 W. LaFave, Search and Seizure § 6.5 (1978).

The illegality of the initial entry, as we will show, has no bearing on the second question. The resolution of this second question requires that we determine whether the initial entry tainted the discovery of the evidence now challenged. On this issue, we hold that the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and therefore constituted an independent source for the evidence under *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

## II

In January 1981, the New York Drug Enforcement Task Force received information indicating that petitioners Andres Segura and Luz Marina Colon probably were trafficking in cocaine from their New York apartment. Acting on this information, Task Force agents maintained continuing surveillance over petitioners until their arrest on February 12, 1981. On February 9, agents observed a meeting between Segura and Enrique Rivudalla-Vidal, during which, as it later developed, the two discussed the possible sale of cocaine by Segura to Rivudalla-Vidal. Three days later, February 12, Segura telephoned Rivudalla-Vidal and agreed to provide him with cocaine. The two agreed that the delivery would be made at 5 p. m. that day at a designated fast-food restaurant in Queens, N. Y. Rivudalla-Vidal and one Esther Parra, arrived at the restaurant at 5 p. m., as agreed. While Segura and Rivudalla-Vidal visited inside the restaurant, agents observed Colon deliver a bulky package to Parra, who had remained in Rivudalla-Vidal's car in the restaurant parking lot. A short time after the delivery of the package, Rivudalla-Vidal and Parra left the restaurant and proceeded to their apartment. Task Force agents followed. The agents stopped the couple as they were about to enter Rivudalla-Vidal's apartment. Parra was found to possess cocaine; both Rivudalla-Vidal and Parra were immediately arrested.

After Rivudalla-Vidal and Parra were advised of their constitutional rights, Rivudalla-Vidal agreed to cooperate with the agents. He admitted that he had purchased the cocaine from Segura and he confirmed that Colon had made the delivery at the fast-food restaurant earlier that day, as the agents had observed. Rivudalla-Vidal informed the agents that Segura was to call him at approximately 10 o'clock that evening to learn if Rivudalla-Vidal had sold the cocaine, in which case Segura was to deliver additional cocaine.

Between 6:30 and 7 p. m., the same day, Task Force agents sought and received authorization from an Assistant United States Attorney to arrest Segura and Colon. The agents were advised by the Assistant United States Attorney that because of the lateness of the hour, a search warrant for petitioners' apartment probably could not be obtained until the following day, but that the agents should proceed to secure the premises to prevent the destruction of evidence.

At about 7:30 p. m., the agents arrived at petitioners' apartment and established external surveillance. At 11:15 p. m., Segura, alone, entered the lobby of the apartment building where he was immediately arrested by agents. He first claimed he did not reside in the building. The agents took him to his third floor apartment, and when they knocked on the apartment door, a woman later identified as Colon appeared; the agents then entered with Segura, without requesting or receiving permission. There were three persons in the living room of the apartment in addition to Colon. Those present were informed by the agents that Segura was under arrest and that a search warrant for the apartment was being obtained.

Following this brief exchange in the living room, the agents conducted a limited security check of the apartment to ensure that no one else was there who might pose a threat to their safety or destroy evidence. In the process, the agents observed, in a bedroom in plain view, a triple-beam scale, jars of lactose, and numerous small cellophane bags, all accouterments of drug trafficking. None of these items was disturbed by the agents. After this limited security check, Colon was arrested. In the search incident to her arrest, agents found in her purse a loaded revolver and more than $2,000 in cash. Colon, Segura, and the other occupants of the apartment were taken to Drug Enforcement Administration headquarters.

Two Task Force agents remained in petitioners' apartment awaiting the warrant. Because of what is characterized as "administrative delay" the warrant application was not presented to the Magistrate until 5 p. m. the next day. The warrant was issued and the search was performed at approximately 6 p. m., some 19 hours after the agents' initial entry into the apartment. In the search pursuant to the warrant, agents discovered almost three pounds of cocaine, 18 rounds of .38-caliber ammunition fitting the revolver agents had found in Colon's possession at the time of her arrest, more than $50,000 cash, and records of narcotics transactions. Agents seized these items, together with those observed during the security check the previous night.

Before trial in the United States District Court in the Eastern District of New York, petitioners moved to suppress all of the evidence seized from the apartment—the items discovered in plain view during the initial security check and those not in plain view first discovered during the subsequent warrant search.[2] After a full evidentiary hearing, the

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[2] Rivudalla-Vidal and Parra were indicted with petitioners and were charged with one count of possession with intent to distribute one-half kilogram of cocaine on one occasion and one kilogram on another occasion. Both pleaded guilty to the charges. They moved in the District Court to suppress the one-half kilogram of cocaine found on Parra's person at the time of their arrests on the ground that the Task Force agents had stopped them in violation of *Terry* v. *Ohio*, 392 U. S. 1 (1968). The court denied

District Court granted petitioners' motion. The court ruled that there were no exigent circumstances justifying the initial entry into the apartment. Accordingly, it held that the entry, the arrest of Colon and search incident to her arrest, and the effective seizure of the drug paraphernalia in plain view were illegal. The District Court ordered this evidence suppressed as "fruits" of illegal searches.

The District Court held that the warrant later issued was supported by information sufficient to establish probable cause; however, it read *United States* v. *Griffin*, 502 F. 2d 959 (CA6), cert. denied, 419 U. S. 1050 (1974), as requiring suppression of the evidence seized under the valid warrant.[3] The District Court reasoned that this evidence would not necessarily have been discovered because, absent the illegal entry and "occupation" of the apartment, Colon might have arranged to have the drugs removed or destroyed, in which event they would not have been in the apartment when the warrant search was made. Under this analysis, the District Court held that even the drugs seized under the valid warrant were "fruit of the poisonous tree."

On an appeal limited to the admissibility of the incriminating evidence, the Court of Appeals affirmed in part and reversed in part. 663 F. 2d 411 (1981). It affirmed the District Court holding that the initial warrantless entry was not justified by exigent circumstances and that the evidence discovered in plain view during the initial entry must be suppressed.[4] The Court of Appeals rejected the argument

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the motion. Rivudalla-Vidal and Parra absconded prior to sentencing by the District Court.

[3] In *Griffin*, absent exigent circumstances, police officers forcibly entered an apartment and discovered in plain view narcotics and related paraphernalia. The entry took place while other officers sought a search warrant. The Court of Appeals for the Sixth Circuit affirmed the District Court's grant of the defendant's suppression motion.

[4] Both the District Court and the Court of Appeals held that the initial entry into the apartment was not justified by exigent circumstances, and thus that the items discovered in plain view during the limited security

advanced by the United States that the evidence in plain view should not be excluded because it was not actually "seized" until after the search warrant was secured.

Relying upon its holding in *United States* v. *Agapito*, 620 F. 2d 324 (CA2), cert. denied, 449 U. S. 834 (1980),[5] the Court of Appeals reversed the District Court's holding requiring suppression of the evidence seized under the valid warrant executed on the day following the initial entry. The Court of Appeals described as "prudentially unsound" the District Court's decision to suppress that evidence simply because it could have been destroyed had the agents not entered.

Petitioners were convicted of conspiring to distribute cocaine, in violation of 21 U. S. C. § 846, and of distributing and possessing with intent to distribute cocaine, in violation of 21 U. S. C. § 841(a)(1). On the subsequent review of these convictions, the Second Circuit affirmed, 697 F. 2d 300 (1982), rejecting claims by petitioners that the search warrant was procured through material misrepresentations and that the evidence at trial was insufficient as a matter of law to support

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check had to be suppressed to effect the purposes of the Fourth Amendment. The United States, although it does not concede the correctness of this holding, does not contest it in this Court. Because the Government has decided not to press its argument that exigent circumstances existed, we need not and do not address this aspect of the Court of Appeals decision. We are concerned only with whether the Court of Appeals properly determined that the Fourth Amendment did not require suppression of the evidence seized during execution of the valid warrant.

[5] In *Agapito*, DEA agents, following a 2-day surveillance of the defendant's hotel room, arrested the suspected occupants of the room in the lobby of the hotel. After the arrests, the agents entered the hotel room and remained within, with the exception of periodic departures, for almost 24 hours until a search warrant issued. During their stay in the room, the agents seized but did not open a suitcase found in the room. In the search pursuant to the warrant, the agents found cocaine in the suitcase. Although the Second Circuit held that the initial entry was illegal, it held that the cocaine need not be suppressed because it was discovered in the search under the valid warrant.

their convictions. We granted certiorari, 459 U. S. 1200 (1983), and we affirm.

## III

At the outset, it is important to focus on the narrow and precise question now before us. As we have noted, the Court of Appeals agreed with the District Court that the initial warrantless entry and the limited security search were not justified by exigent circumstances and were therefore illegal. No review of that aspect of the case was sought by the Government and no issue concerning items observed during the initial entry is before the Court. The only issue here is whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed.

The suppression or exclusionary rule is a judicially prescribed remedial measure and as "with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Under this Court's holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, *Weeks* v. *United States*, 232 U. S. 383 (1914), but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). It "extends as well to the indirect as the direct products" of unconstitutional conduct. *Wong Sun* v. *United States*, 371 U. S. 471, 484 (1963).

Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was

> "'come at by exploitation of [the initial] illegality or instead by means *sufficiently distinguishable* to be purged

> of the primary taint.'" *Id.*, at 488 (citation omitted; emphasis added).

It has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *Nardone* v. *United States*, *supra*, at 341. It is not to be excluded, for example, if police had an "independent source" for discovery of the evidence:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others.*" *Silverthorne Lumber Co.* v. *United States*, 251 U. S., at 392 (emphasis added).

In short, it is clear from our prior holdings that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" *Wong Sun*, *supra*, at 487 (quoting *Silverthorne Lumber Co.*, *supra*, at 392); see also *United States* v. *Crews*, 445 U. S. 463 (1980); *United States* v. *Wade*, 388 U. S. 218, 242 (1967); *Costello* v. *United States*, 365 U. S. 265, 278–280 (1961).

## IV

Petitioners argue that all of the contents of the apartment, seen and not seen, including the evidence now in question, were "seized" when the agents entered and remained on the premises while the lawful occupants were away from the apartment in police custody. The essence of this argument is that because the contents were then under the control of the agents and no one would have been permitted to remove the incriminating evidence from the premises or destroy it, a "seizure" took place. Plainly, this argument is advanced to avoid the *Silverthorne* "independent source" exception. If all the contents of the apartment were "seized" at the time of the illegal entry and securing, presumably the evidence now challenged would be suppressible as primary evidence obtained as a direct result of that entry.

We need not decide whether, when the agents entered the apartment and secured the premises, they effected a seizure of the cocaine, the cash, the ammunition, and the narcotics records within the meaning of the Fourth Amendment. By its terms, the Fourth Amendment forbids only "unreasonable" searches and seizures. Assuming, *arguendo*, that the agents seized the entire apartment and its contents, as petitioners suggest, the seizure was not unreasonable under the totality of the circumstances.

Different interests are implicated by a seizure than by a search. *United States* v. *Jacobsen*, 466 U. S. 109, 113, and n. 5, 122–126 (1984); *Texas* v. *Brown*, 460 U. S. 730 (1983); *id.*, at 747–748 (STEVENS, J., concurring in judgment); *United States* v. *Chadwick*, 433 U. S. 1, 13–14, n. 8 (1977); *Chambers* v. *Maroney*, 399 U. S. 42, 51–52 (1970). A seizure affects only the person's possessory interests; a search affects a person's privacy interests. *United States* v. *Jacobsen*, *supra*, at 113, and n. 5; *United States* v. *Chadwick*, *supra*, at 13–14, n. 8; see generally *Texas* v. *Brown*, *supra*, at 747–751 (STEVENS, J., concurring in judgment). Recognizing the generally less intrusive nature of a seizure, *Chadwick*, *supra*, at 13–14, n. 8; *Chambers* v. *Maroney*, *supra*, at 51, the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible. *Chambers* v. *Maroney*, *supra; United States* v. *Chadwick*, *supra; Arkansas* v. *Sanders*, 442 U. S. 753 (1979).[6]

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[6] In two instances, the Court has allowed temporary seizures and limited detentions of property based upon less than probable cause. In *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970), the Court refused to

We focused on the issue notably in *Chambers*, holding that it was reasonable to seize and impound an automobile, on the basis of probable cause, for "whatever period is necessary to obtain a warrant for the search." 399 U. S., at 51 (footnote omitted). We acknowledged in *Chambers* that following the car until a warrant could be obtained was an alternative to impoundment, albeit an impractical one. But we allowed the seizure nonetheless because otherwise the occupants of the car could have removed the "instruments or fruits of crime" before the search. *Id.*, at 51, n. 9. The Court allowed the warrantless seizure to protect the evidence from destruction even though there was no immediate fear that the evidence was in the process of being destroyed or otherwise lost. The *Chambers* Court declared:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding the car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. *Given probable cause to search,*

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invalidate the seizure and detention—on the basis of only reasonable suspicion—of two packages delivered to a United States Post Office for mailing. One of the packages was detained on mere suspicion for only 1½ hours; by the end of that period enough information had been obtained to establish probable cause that the packages contained stolen coins. But the other package was detained for 29 hours before a search warrant was finally served. Both seizures were held reasonable. In fact, the Court suggested that both seizures and detentions for these "limited times" were "prudent" under the circumstances.

Only last Term, in *United States* v. *Place*, 462 U. S. 696 (1983), we considered the validity of a brief seizure and detention of a traveler's luggage, on the basis of a reasonable suspicion that the luggage contained contraband; the purpose of the seizure and brief detention was to investigate further the causes for the suspicion. Although we held that the 90-minute detention of the luggage in the airport was, under the circumstances, unreasonable, we held that the rationale of *Terry* v. *Ohio*, 392 U. S. 1 (1968), applies to permit an officer, on the basis of reasonable suspicion that a traveler is carrying luggage containing contraband, to seize and detain the luggage briefly to "investigate the circumstances that aroused his suspicion." 462 U. S., at 706.

> *either course is reasonable under the Fourth Amendment.*" *Id.*, at 52 (emphasis added)

In *Chadwick*, we held that the warrantless *search* of the footlocker after it had been seized and was in a secure area of the Federal Building violated the Fourth Amendment's proscription against unreasonable searches, but neither the respondents nor the Court questioned the validity of the initial warrantless *seizure* of the footlocker on the basis of probable cause. The seizure of Chadwick's footlocker clearly interfered with his use and possession of the footlocker—his possessory interest—but we held that this did not "diminish [his] legitimate expectation that the footlocker's *contents* would remain private." 433 U. S., at 13–14, n. 8 (emphasis added). And again, in *Arkansas* v. *Sanders*, *supra*, we held that absent exigent circumstances a warrant was required to search luggage seized from an automobile which was already in the possession and control of police at the time of the search. However, we expressly noted that the police acted not only "properly," but "commendably" in seizing the suitcase without a warrant on the basis of probable cause to believe that it contained drugs. 442 U. S., at 761. The taxi into which the suitcase had been placed was about to drive away. However, just as there was no immediate threat of loss or destruction of evidence in *Chambers*—since officers could have followed the car until a warrant issued—so too in *Sanders* officers could have followed the taxicab. Indeed, there arguably was even less fear of immediate loss of the evidence in *Sanders* because the suitcase at issue had been placed in the vehicle's trunk, thus rendering immediate access unlikely before police could act.

Underlying these decisions is a belief that society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity. See *United States* v. *Place*, 462 U. S. 696 (1983).

The Court has not had occasion to consider whether, when officers have probable cause to believe that evidence of criminal activity is on the premises, the temporary securing of a dwelling to prevent the removal or destruction of evidence violates the Fourth Amendment. However, in two cases we have suggested that securing of premises under these circumstances does not violate the Fourth Amendment, at least when undertaken to preserve the status quo while a search warrant is being sought. In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we noted with approval that, to preserve evidence, a police guard had been stationed at the entrance to an apartment in which a homicide had been committed, even though "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant." *Id.*, at 394. Similarly, in *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), although officers secured, from within, the home of a person for whom they had an arrest warrant, and detained all occupants while other officers were obtaining a search warrant, the Court did not question the admissibility of evidence discovered pursuant to the warrant later issued.[7]

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[7] A distinguished constitutional scholar raised the question whether a seizure of premises might not be appropriate to preserve the status quo and protect valuable evidence while police officers in good faith seek a warrant.

"Here there is a very real practical problem. Does the police officer have any power to maintain the status quo while he, or a colleague of his, is taking the time necessary to draw up a sufficient affidavit to support an application for a search warrant, and then finding a magistrate, submitting the application to him, obtaining the search warrant if it is issued, and then bringing it to the place where the arrest was made. It seems inevitable that a minimum of several hours will be required for this process, at the very best. *Unless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless.*" Griswold, 29 Md. L. Rev., at 317 (emphasis added).

Justice Black posed essentially the same question in his dissent in *Vale* v. *Louisiana*, 399 U. S. 30, 36 (1970). After pointing out that Vale's arrest just outside his residence was "plainly visible to anyone within the house, We see no reason, as *Mincey* and *Rawlings* would suggest, why the same principle applied in *Chambers*, *Chadwick*, and *Sanders*, should not apply where a dwelling is involved. The sanctity of the home is not to be disputed. But the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within. "[T]he Fourth Amendment protects people, not places." *Katz* v. *United States*, 389 U. S. 347, 351 (1967); see also *Payton* v. *New York*, 445 U. S. 573, 615 (1980) (WHITE, J., dissenting).

As we have noted, however, a seizure affects only possessory interests, not privacy interests. Therefore, the heightened protection we accord privacy interests is simply not implicated where a *seizure* of premises, not a search, is at issue. We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents. We reaffirm at the same time, however, that, absent exigent circumstances, a warrantless search—such as that invalidated in *Vale* v. *Louisiana*, 399 U. S. 30, 33–34 (1970)—is illegal.

Here, the agents had abundant probable cause in advance of their entry to believe that there was a criminal drug operation being carried on in petitioners' apartment; indeed petitioners do not dispute the probable-cause determination. The agents had maintained surveillance over petitioners for weeks, and had observed petitioners leave the apartment to

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and the police had every reason to believe that someone in the house was likely to destroy the contraband if the search were postponed," he noted:

"This case raises most graphically the question how does a policeman protect evidence necessary to the State if he must leave the premises to get a warrant, allowing the evidence he seeks to be destroyed. The Court's answer to that question makes unnecessarily difficult the conviction of those who prey upon society." *Id.*, at 41.

make sales of cocaine. Wholly apart from observations made during that extended surveillance, Rivudalla-Vidal had told agents after his arrest on February 13, that petitioners had supplied him with cocaine earlier that day, that he had not purchased all of the cocaine offered by Segura, and that Segura probably had more cocaine in the apartment. On the basis of this information, a Magistrate duly issued a search warrant, the validity of which was upheld by both the District Court and the Court of Appeals, and which is not before us now.

In this case, the agents entered and secured the apartment from within. Arguably, the wiser course would have been to depart immediately and secure the premises from the outside by a "stakeout" once the security check revealed that no one other than those taken into custody were in the apartment. But the method actually employed does not require a different result under the Fourth Amendment, insofar as the *seizure* is concerned. As the Court of Appeals held, absent exigent circumstances, the entry may have constituted an illegal *search*, or interference with petitioners' privacy interests, requiring suppression of all evidence observed during the entry. Securing of the premises from within, however, was no more an interference with the petitioners' possessory interests in the contents of the apartment than a perimeter "stakeout." In other words, the initial entry—legal or not—does not affect the reasonableness of the seizure. Under either method—entry and securing from within or a perimeter stakeout—agents control the apartment pending arrival of the warrant; both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners.

Petitioners argue that we heighten the possibility of illegal entries by a holding that the illegal entry and securing of the premises from the inside do not themselves render the *seizure* any more unreasonable than had the agents staked out the apartment from the outside. We disagree. In the first place, an entry in the absence of exigent circumstances is illegal. We are unwilling to believe that officers will routinely and purposely violate the law as a matter of course. Second, as a practical matter, officers who have probable cause and who are in the process of obtaining a warrant have no reason to enter the premises before the warrant issues, absent exigent circumstances which, of course, would justify the entry. *United States* v. *Santana*, 427 U. S. 38 (1976); *Johnson* v. *United States*, 333 U. S. 10 (1948). Third, officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case. Finally, if officers enter without exigent circumstances to justify the entry, they expose themselves to potential civil liability under 42 U. S. C. § 1983. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971).

Of course, a seizure reasonable at its inception because based upon probable cause may become unreasonable as a result of its duration or for other reasons. Cf. *United States* v. *Place*, 462 U. S. 696 (1983). Here, because of the delay in securing the warrant, the occupation of the apartment continued throughout the night and into the next day. Such delay in securing a warrant in a large metropolitan center unfortunately is not uncommon; this is not, in itself, evidence of bad faith. And there is no suggestion that the officers, in bad faith, purposely delayed obtaining the warrant. The asserted explanation is that the officers focused first on the task of processing those whom they had arrested before turning to the task of securing the warrant. It is not unreasonable for officers to believe that the former should take priority, given, as was the case here, that the proprietors of the apartment were in the custody of the officers throughout the period in question.

There is no evidence that the agents in any way exploited their presence in the apartment; they simply awaited issuance of the warrant. Moreover, more than half of the 19-

hour delay was between 10 p. m. and 10 a. m. the following day, when it is reasonable to assume that judicial officers are not as readily available for consideration of warrant requests. Finally, and most important, we observed in *United States* v. *Place*, *supra*, at 705, that

> "[t]he intrusion on possessory interests occasioned by a seizure . . . can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or . . . from the immediate custody and control of the owner."

Here, of course, Segura and Colon, whose possessory interests were interfered with by the occupation, were under arrest and in the custody of the police throughout the entire period the agents occupied the apartment. The actual interference with their possessory interests in the apartment and its contents was, thus, virtually nonexistent. Cf. *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970). We are not prepared to say under these limited circumstances that the seizure was unreasonable under the Fourth Amendment.[8]

## V

Petitioners also argue that even if the evidence was not subject to suppression as primary evidence "seized" by virtue of the initial illegal entry and occupation of the premises, it should have been excluded as "fruit" derived from that illegal entry. Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. Exclusion of evidence as derivative or "fruit of the poisonous tree" is not warranted here because of that independent source.

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[8] Our decision in *United States* v. *Place*, 462 U. S. 696 (1983), is not inconsistent with this conclusion. There, we found unreasonable a 90-minute detention of a traveler's luggage. But the detention was based only on a suspicion that the luggage contained contraband, not on probable cause. After probable cause was established, authorities held the unopened luggage for almost three days before a warrant was obtained. It was not suggested that this delay presented an independent basis for suppression of the evidence eventually discovered.

None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a "means sufficiently distinguishable" to purge the evidence of any "taint" arising from the entry. *Wong Sun*, 371 U. S., at 488.[9] Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here. The legality of the initial entry is, thus, wholly irrelevant under *Wong Sun*, *supra*, and

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[9] Our holding in this respect is consistent with the vast majority of Federal Courts of Appeals which have held that evidence obtained pursuant to a valid warrant search need not be excluded because of a prior illegal entry. See, *e. g.*, *United States* v. *Perez*, 700 F. 2d 1232 (CA8 1983); *United States* v. *Kinney*, 638 F. 2d 941 (CA6), cert. denied, 452 U. S. 918 (1981); *United States* v. *Fitzharris*, 633 F. 2d 416 (CA5 1980), cert. denied, 451 U. S. 988 (1981); *United States* v. *Agapito*, 620 F. 2d 324 (CA2 1980); *United States* v. *Bosby*, 675 F. 2d 1174 (CA11 1982) (dictum). The only Federal Court of Appeals to hold otherwise is the Ninth Circuit. See *United States* v. *Lomas*, 706 F. 2d 886 (1983); *United States* v. *Allard*, 634 F. 2d 1182 (1980).

*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).[10]

Our conclusion that the challenged evidence was admissible is fully supported by our prior cases going back more than a half century. The Court has never held that evidence is "fruit of the poisonous tree" simply because "it would not have come to light but for the illegal actions of the police." See *Wong Sun, supra*, at 487–488; *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980); *Brown* v. *Illinois*, 422 U. S. 590, 599 (1975). That would squarely conflict with *Silverthorne* and our other cases allowing admission of evidence, notwithstanding a prior illegality, when the link between the illegality and that evidence was sufficiently attenuated to dissipate the taint. By the same token, our cases make clear that evidence will not be excluded as "fruit" unless the illegality is at least the "but for" cause of the discovery of the evidence. Suppression is not justified unless "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U. S., at 471. The illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant; it is clear, therefore, that not even the threshold "but for" requirement was met in this case.

The dissent contends that the initial entry and securing of the premises are the "but for" causes of the discovery of the evidence in that, had the agents not entered the apartment, but instead secured the premises from the outside, Colon or her friends if alerted, could have removed or destroyed the evidence before the warrant issued. While the dissent embraces this "reasoning," petitioners do not press this argument. The Court of Appeals rejected this argument as "prudentially unsound" and because it rested on "wholly speculative assumptions." Among other things, the Court of Appeals suggested that, had the agents waited to enter the apartment until the warrant issued, they might not have decided to take Segura to the apartment and thereby alert Colon. Or, once alerted by Segura's failure to appear, Colon might have attempted to remove the evidence, rather than destroy it, in which event the agents could have intercepted her and the evidence.

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[10] It is important to note that the dissent stresses the legal status of the agents' initial entry and occupation of the apartment; however, this case involves only evidence seized in the search made subsequently under a valid warrant. Implicit in the dissent is that the agents' presence in the apartment denied petitioners some legal "right" to arrange to have the incriminating evidence concealed or destroyed.

We agree fully with the Court of Appeals that the District Court's suggestion that Colon and her cohorts would have removed or destroyed the evidence was pure speculation. Even more important, however, we decline to extend the exclusionary rule, which already exacts an enormous price from society and our system of justice, to further "protect" criminal activity, as the dissent would have us do.

It may be that, if the agents had not entered the apartment, petitioners might have arranged for the removal or destruction of the evidence, and that in this sense the agents' actions could be considered the "but for" cause for discovery of the evidence. But at this juncture, we are reminded of Justice Frankfurter's warning that "[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof," and his admonition that the courts should consider whether "[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint." *Nardone*, 308 U. S., at 341. The essence of the dissent is that there is some "constitutional right" to destroy evidence. This concept defies both logic and common sense.

## VI

We agree with the Court of Appeals that the cocaine, cash records, and ammunition were properly admitted into evidence. Accordingly, the judgment is affirmed.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Correct analysis of the Fourth Amendment issues raised by this case requires, first, a precise identification of the two constitutional violations that occurred, and, second, an explanation of why a remedy for both is appropriate. While I do not believe that the current record justifies suppression of the challenged evidence, neither does it justify affirmance of petitioners' convictions. We must consider the substantial contention, supported by the findings of the District Court and left unaddressed by the opinion of this Court, that the authorities' access to the evidence introduced against petitioners at trial was made possible only through exploitation of both constitutional violations. Because I believe that contention must be addressed before petitioners' convictions are finally affirmed, I would remand for further proceedings. The Court's disposition, I fear, will provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home. The Court's disposition is, therefore, inconsistent with a primary purpose of the Fourth Amendment's exclusionary rule—to ensure that all private citizens—not just these petitioners—have some meaningful protection against future violations of their rights.

## I

The events that occurred on February 12 and 13, 1981, were the culmination of an investigation of petitioners that had been under way for over two weeks. On the evening of February 12, agents of the New York Drug Enforcement Task Force arrested Rivudalla-Vidal and Parra, who told them that Segura probably had cocaine in his apartment. At that point, the agents concluded that they had probable cause to search petitioners' apartment, and contacted the United States Attorney's office. An Assistant United States Attorney informed the agents that at that hour, 6:30 p. m., it was too late to obtain a search warrant, and advised them instead to go to the apartment, arrest Segura, and "secure the premises" pending the issuance of a warrant.[1] The agents arrived at the apartment about an hour later and positioned themselves on a fire escape, where they could observe anyone entering or leaving the apartment. They also put their ears to the door, but heard nothing.[2] After three hours of waiting, the agents left their perch and went outside the building, where they continued waiting for Segura to show up. The District Court described what followed:

> "Around 11:15 p. m. Segura appeared, and as he began to enter the locked door at the lobby, he was apprehended, and placed in handcuffs under arrest. The agents, led by Shea, informed him that they wanted to go upstairs to 3D, to which Segura replied that he did not live in the building or in that apartment. Forcibly bringing him to the third floor, the agents began down the hallway, at which point Segura again resisted. Shea again forced him down the hallway to the door of 3D, an

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[1] THE CHIEF JUSTICE seems to think that this problem was caused by the unavailability of a magistrate to issue a warrant at this hour, *ante*, at 812-813. However, as the Government candidly admits, the fault here lies not with the judiciary, but with the United States Attorney's office for failing to exercise due diligence in attempting to procure a warrant. One of the agents testified that the Assistant United States Attorney told him only that "*perhaps* a Magistrate could not be found at that particular time in the evening." Tr. 154 (emphasis supplied). The Assistant United States Attorney testified that he did not even attempt to locate a magistrate or obtain a search warrant. *Id.*, at 441-442. As the Government concedes in its brief:

> "It is not clear why a greater effort was not made to obtain a search warrant when the officers first sought one, and we do not condone the failure to do so . . . . We note that, subsequent to the events in this case, the United States Attorney circulated an internal memorandum reemphasizing that search warrants should be sought when at all possible, regardless of the hour, in order to avoid the need for warrantless entries to secure premises." Brief for United States 40, n. 23.

[2] Based on the information they had been given prior to their arrival at the apartment, the agents believed, correctly as it turned out, that Segura was not in the apartment. Tr. 394.

> apartment which is located in the rear of the building, with no view of the front of the building where the arrest took place. Shea knocked on the door of 3D, with Segura standing, handcuffed, in front of him. Luz Colon, unknown to Shea at the time as such, opened the door. Detective Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest warrant, or a search warrant. Nor did any of the officers ask for or receive consent to enter apartment 3D." App. 10–11.

The agents arrested Colon and three other persons found in the apartment. Colon was unknown to the agents at the time.[3] The agents made a cursory search of the apartment and saw various items of narcotics paraphernalia in plain view.[4] The agents left that evidence—the "prewarrant evidence"—in the apartment, but they took the arrestees to headquarters.

At least two of the agents spent the night in the apartment and remained in it thoughout the following day while their colleagues booked the arrestees and presumably persevered in their efforts to obtain a warrant to search the apartment. Finally, at 6 p. m. on February 13, the remaining agents were informed that a search warrant had just been issued, and at that point they conducted a thorough search. The District Court concluded: "There was thus a lapse of some 18–20 hours from the entry into the apartment to the execution of the search warrant, during which time the officers remained inside the apartment and in complete control of it." *Id.*, at 11. Upon searching the apartment the agents found one kilo of cocaine, over $50,000, several rounds of .38-caliber ammunition, and records of narcotics transactions.

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[3] *Id.*, at 366, 392.

[4] However, none of this evidence could be seen until after the agents had entered the apartment. *Id.*, at 405.

## II

The Court frames the appropriate inquiry in this case as whether the evidence obtained when the search warrant was executed was a "fruit" of illegal conduct. *Ante*, at 804. As a predicate to that inquiry, the illegal conduct must, of course, be identified.

The District Court found that no exigent circumstances justified the agents' initial warrantless entry into petitioners' apartment. App. 11–13. The Court of Appeals affirmed this finding, and the Government did not seek review of it by this Court. Thus, it is uncontested that the warrantless entry of petitioners' apartment was unconstitutional.[5] It is equally clear that the subsequent 18–20-hour occupation of the apartment was independently unconstitutional for two separate reasons.

First, the occupation was an unreasonable "search" within the meaning of the Fourth Amendment. A "search" for purposes of the Fourth Amendment occurs when a reasonable expectation of privacy is infringed.[6] Nowhere are expectations of privacy greater than in the home. As the Court has repeatedly noted, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972).[7] Of course, the invasion of privacy occasioned by a physical entry does not cease after the initial entry. In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we held that although the police lawfully entered Mincey's home to arrest him, the Constitution forbade them to remain in the home and to search it. The Court reasoned that despite the lawful initial entry, Mincey retained a constitutionally protected privacy interest in his home that could not be infringed without a warrant. See *id.*, at 390–391. Similarly, in *Chimel* v. *California*, 395 U. S. 752 (1969), we could "see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*, at 766–767, n. 12.[8] Here, by remaining in the home after the initial entry, the agents exacerbated the invasion of petitioners' protected privacy interests. Even assuming the most innocent of motives, the agents' occupation of petitioners' living quarters inevitably involved scrutiny of a variety of personal effects throughout the apartment.[9] Petitioners' privacy interests were unreasonably infringed by the agents' prolonged

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[5] In *Vale* v. *Louisiana*, 399 U. S. 30 (1970), we held that absent a demonstrable threat of imminent destruction of evidence, the authorities may not enter a residence in order to preserve that evidence without a warrant. See also *United States* v. *Jeffers*, 342 U. S. 48, 51–52 (1951); *McDonald* v. *United States*, 335 U. S. 451, 454–455 (1948); *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948). The illegality is even more plain in this case because the entry was effected by force late at night.

[6] See *Oliver* v. *United States*, 466 U. S. 170, 177 (1984); *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983); *United States* v. *Knotts*, 460 U. S. 276, 280–281 (1983); *Smith* v. *Maryland*, 442 U. S. 735, 739–741 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968).

[7] See also, *e. g.*, *Welsh* v. *Wisconsin*, 466 U. S. 740, 748 (1984); *Michigan* v. *Clifford*, 464 U. S. 287, 296–297 (1984) (plurality opinion); *Steagald*

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v. *United States*, 451 U. S. 204, 212 (1981); *Payton* v. *New York*, 445 U. S. 573, 583–590 (1980); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971); *McDonald* v. *United States*, 335 U. S., at 455–456; *Johnson* v. *United States*, 333 U. S., at 13–14.

[8] See also 395 U. S., at 764–765:

"It is argued in the present case that it is 'reasonable' to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest."

[9] At oral argument, the Government conceded that the agents' occupation of the apartment constituted a "continuing search" for exactly this reason. Tr. of Oral Arg. 27, 31.

occupation of their home. THE CHIEF JUSTICE simply ignores this point, assuming that there is no constitutional distinction between surveillance of the home from the outside and physical occupation from the inside. THE CHIEF JUSTICE's assumption is, of course, untenable; there is a fundamental difference when there is a

> "breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone which finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'" *Payton* v. *New York*, 445 U. S. 573, 589 (1980).

Second, the agents' occupation was also an unreasonable "seizure" within the meaning of the Fourth Amendment. A "seizure" occurs when there is some meaningful interference with an individual's possessory interests.[10] There can be no doubt here that petitioners' possessory interests with respect to their apartment were subject to meaningful governmental interference. The agents not only excluded petitioners from access to their own apartment, and thereby prevented them from exercising any possessory right at all to the apartment and its contents, but they also exercised complete dominion and control over the apartment and its contents.[11] Our cases virtually compel the conclusion that the contents of the apartment were seized. We have held that when the police take custody of a person, they concomitantly acquire lawful custody of his personal effects, see *Illinois* v. *Lafayette*, 462 U. S. 640, 648 (1983); *United States* v. *Edwards*, 415 U. S. 800 (1974); *United States* v. *Robinson*, 414 U. S. 218 (1973); and when they take custody of a car, they are also in lawful custody of its contents, see *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). Surely it follows that when the authorities take custody of an apartment they also take custody of its contents.[12]

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[10] See *United States* v. *Karo*, *ante*, at 712–713; *United States* v. *Jacobsen*, 466 U. S. 109, 120–121, 124–125 (1984); *United States* v. *Place*, 462 U. S. 696, 707–708 (1983); *id.*, at 716 (BRENNAN, J., concurring in result); *Texas* v. *Brown*, 460 U. S. 730, 747–748 (1983) (STEVENS, J., concurring in judgment).

[11] While Segura was lawfully in custody during this period, Colon and her three companions were not. They were unknown to the agents prior to the illegal entry and, as the District Court noted, would have been able to remain in the apartment free from governmental interference had the unlawful entry not occurred.

This seizure was constitutionally unreasonable. Even a seizure reasonable at its inception can become unreasonable because of its duration. *United States* v. *Place*, 462 U. S. 696, 709–710 (1983). Even if exigent circumstances justified the entry into and impoundment of the premises pending a warrant—and no one even argues that such circumstances existed—the duration of the seizure would nevertheless have been unreasonable. While exigent circumstances may justify police conduct that would otherwise be unreasonable if undertaken without a warrant, such conduct must be "strictly circumscribed by the exigencies which justify its initiation," *Terry* v. *Ohio*, 392 U. S. 1, 25–26 (1968).[13] The cases THE CHIEF JUSTICE cites, *ante*, at 807–810, for the proposition that the government may impound premises for the amount of time necessary to procure a warrant thus have no application to this case whatsoever.[14] There is no contention that a period of 18–20 hours was even remotely necessary to procure a warrant. The contrast between the 90-minute duration of the seizure of a piece of luggage held unreasonable in *Place* and the 18–20-hour duration of the seizure of the apartment and its contents in this case graphically illustrates the unreasonable character of the agents' conduct. Moreover, unlike *Place*, which involved a seizure lawful at its inception, this seizure was constitutionally unreasonable from the moment it began. It was conducted without a warrant and in the absence of exigent circumstances.[15] It has been clear since at least *Chimel* v. *California*, 395 U. S. 752 (1969), that the police may neither search nor seize the contents of a home without a warrant.[16] There is simply no basis for concluding that this 18–20-hour warrantless invasion of petitioners' home complied with the Fourth Amendment. Because the agents unreasonably delayed in seeking judicial authorization for their seizure of petitioners' apartment, that seizure was unreasonable.

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[12] THE CHIEF JUSTICE's parsimonious approach to Fourth Amendment rights is vividly illustrated by the fact that, as though he were preparing an adversary's brief, he is unwilling even to acknowledge explicitly that the apartment and its contents were seized, but only "assum[es]" that was the case. *Ante*, at 806.

[13] See *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 358–359 (1977); *Vale* v. *Louisiana*, 399 U. S., at 34–35; *Chimel* v. *California*, 395 U. S. 752, 762–763 (1969).

[14] THE CHIEF JUSTICE's misuse of *Place*, *ante*, at 813, n. 8, is quite remarkable. He suggests that *Place* approved the almost 3-day detention of Place's luggage before a warrant was obtained, when in fact the Court had

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no occasion to reach that issue because it held that the initial 90-minute detention of the luggage pending a "sniff test" using a trained narcotics-detecting dog was *unreasonable*. See 462 U. S., at 710. Other than this reference to *Place*, THE CHIEF JUSTICE's diligent search for support for his holding has produced nothing but dissenting opinions and a law review article. See *ante*, at 809–810, n. 7. Dean Griswold's article, however, did not even purport to answer the question presented by this case. See Griswold, Criminal Procedure, 1969—Is It a Means or an End?, 29 Md. L. Rev. 307, 317 (1969).

[15] Since these premises were impounded "from the inside," I assume impoundment would be permissible even absent exigent circumstances when it occurs "from the outside"—when the authorities merely seal off premises pending the issuance of a warrant but do not enter.

[16] See also *Steagald* v. *United States*, 451 U. S. 204 (1981); *Payton* v. *New York*, 445 U. S. 573 (1980); *Mincey* v. *Arizona*, 437 U. S. 385 (1978); *Vale* v. *Louisiana*, 399 U. S. 30 (1970). In fact, except for an aberrational warrantless "search incident to an arrest" exception recognized in *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), and repudiated by *Chimel*, this rule has been settled since *Agnello* v. *United States*, 269 U. S. 20, 32–33 (1925). See also *Trupiano* v. *United States*, 334 U. S. 699 (1948).

Nevertheless, in what I can only characterize as an astonishing holding, THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR, concludes that the 18–20-hour seizure of the apartment was not unreasonable. He advances three reasons for that conclusion, none of which has any merit.

First, he seeks to justify the delay because "the officers focused first on the task of processing those whom they had arrested before turning to the task of securing the warrant." *Ante*, at 812. But there is no evidence that this task presented any difficulties; indeed, since the arrest of the occupants itself was unconstitutional, it is truly ironic that THE CHIEF JUSTICE uses one wrong to justify another. Of greater significance, the District Court expressly found that the length of the delay was unreasonable and that the Government had made no attempt to justify it; that finding was upheld by the Court of Appeals, and in this Court the Government expressly concedes that the delay was unreasonable.[17]

Second, THE CHIEF JUSTICE suggests that it is relevant that the officers did not act in "bad faith." *Ante*, at 798, 812. This is done despite the fact that there is no finding as to whether the agents acted in good or bad faith; the reason is that the litigants have never raised the issue. More important, this Court has repeatedly held that a police officer's good or bad faith in undertaking a search or seizure is irrelevant to its constitutional reasonableness,[18] and does so again today.[19]

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[17] The only explanation the Government has offered for the delay is that most of February 13 was taken up with "processing" the arrests. Brief for United States 5, n. 4. At oral argument, the Government conceded that the delay was unreasonable. Tr. of Oral Arg. 27. At the suppression hearing in the District Court, one of the agents testified that the warrant application was not even presented to a Magistrate until 5 p. m. on February 13. He explained: "Well, it's very hard to get secretarial services today." Tr. 162–163. The Assistant United States Attorney responsible for procuring the warrant testified similarly. *Id.*, at 445. The attorney did not explain why he did not simply write out the two-page application by hand, or seek a telephonic warrant under Federal Rule of Criminal Procedure 41(c)(2). The District Court found that the delay was unreasonable, App. 15–16, a finding that the Court of Appeals did not disturb. The Government does not challenge that finding in this Court.

Finally, and "most important" to his conclusion, THE CHIEF JUSTICE suggests that there was no significant interference with petitioners' possessory interests in their apartment because they were in custody anyway. *Ante*, at 813. The cases are legion holding that a citizen retains a protected possessory interest in his home and the effects within it which may not be infringed without a warrant even though that person is in custody. *Mincey* and *Chimel* are but two instances of that general rule—the defendants in both cases were in custody, yet both were held to have protected possessory interests in their homes and the effects within them that could not be infringed without a warrant. Even when a person is in custody after an arrest based on probable cause, he still, of course, owns his house and his right to exclude others—including federal narcotics agents—remains inviolate. What is even more strange about THE CHIEF JUSTICE's conclusion is that it permits the authorities to benefit from the fact that they had unlawfully arrested Colon. Colon was in her own home when she was arrested without a warrant. That was unconstitutional.[20] If the agents had decided to obey the Constitution and not arrest Colon, then she would not have "relinquished control" over the property and presumably it would have been unreasonable for the agents to have remained on the premises under THE CHIEF JUSTICE's analysis. However, because the agents conducted an unlawful arrest in addition to their previous unlawful entry, an otherwise unreasonable occupation becomes "reasonable." THE CHIEF JUSTICE's approach is as reasonable as was the agents' conduct. Only in that sense does it achieve its purpose.

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[18] See *Terry* v. *Ohio*, 392 U. S., at 22; *Beck* v. *Ohio*, 379 U. S. 89, 97 (1964); *Henry* v. *United States*, 361 U. S. 98, 102 (1959).

[19] *United States* v. *Leon*, *post*, at 915, n. 13.

[20] *Welsh* v. *Wisconsin*, 466 U. S. 740 (1984); *Payton* v. *New York*, 445 U. S. 573 (1980).

Thus, on the basis of the record evidence and the findings of the District Court, it is clear that the 18–20-hour occupation of petitioners' apartment was a second independent violation of the Fourth Amendment. Not only was it the fruit of the initial illegal entry into that apartment, but it also constituted an unreasonable search and seizure of the apartment. The District Court concluded that both violations should be remedied by suppression of all of the evidence found in the apartment. The Court of Appeals agreed that suppression of the prewarrant evidence was the proper remedy for the first violation but prescribed no remedy for the second. THE CHIEF JUSTICE does not agree that there was a second violation, and the Court concludes that the unconstitutional conduct that did occur was neutralized by the ultimate issuance of a valid warrant. In reaching that conclusion the Court correctly recognizes that the law requires suppression of the evidence if it was "‘"come at by exploitation of [the initial] illegality"'" instead of "‘"by means sufficiently distinguishable to be purged of the primary taint."'" *Ante*, at 804–805 (quoting *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963)). The Court fails, however, to discuss the reason for that rule or how it should apply to the facts of this case.

## III

Every time a court holds that unconstitutionally obtained evidence may not be used in a criminal trial it is acutely aware of the social costs that such a holding entails.[21] Only

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[21] Justice Holmes commented on this dilemma:

"[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should the most compelling reason could justify the repeated imposition of such costs on society. That reason, of course, is to prevent violations of the Constitution from occurring.[22]

As the Court has repeatedly stated, a principal purpose of the exclusionary rule is to deter violations of the Fourth Amendment. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465, 486 (1976); *United States* v. *Janis*, 428 U. S. 433, 446–447 (1976); *United States* v. *Peltier*, 422 U. S. 531, 536–539 (1975); *United States* v. *Calandra*, 414 U. S. 338, 347–348 (1974).

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitu-

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be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (dissenting opinion).

[22] Justice Stewart has written:

"[T]he Framers did not intend the Bill of Rights to be no more than unenforceable guiding principles—no more than a code of ethics under an honor system. The proscriptions and guarantees in the amendments were intended to create legal rights and duties.

"The Bill of Rights is but one component of our legal system—the one that limits the government's reach. The primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, has been vested in the judicial branch. In general, when law enforcement officials violate a person's Fourth Amendment rights, they do so in attempting to obtain evidence for use in criminal proceedings. To give effect to the Constitution's prohibition against illegal searches and seizures, it may be necessary for the judiciary to remove the incentive for violating it. Thus, it may be argued that although the Constitution does not explicitly provide for exclusion, the need to enforce the Constitution's limits on government—to preserve the rule of law—requires an exclusionary rule." Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule, 83 Colum. L. Rev. 1365, 1383–1384 (1983) (footnotes omitted).

> tional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U. S. 206, 217 (1960).

The deterrence rationale for the exclusionary rule sometimes, but not always, requires that it be applied to the indirect consequences of a constitutional violation. If the government could utilize evidence obtained through exploitation of illegal conduct, it would retain an incentive to engage in that conduct. "To forbid the direct use of methods thus characterized [as illegal] but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Nardone* v. *United States*, 308 U. S. 338, 340 (1939).

We have not, however, mechanically applied the rule to every item of evidence that has a causal connection with police misconduct. "The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown* v. *Illinois*, 422 U. S. 590, 609 (1975) (POWELL, J., concurring in part).[23]

This point is well illustrated by our cases concerning the use of confessions obtained as the result of unlawful arrests. In *Wong Sun* v. *United States*, 371 U. S. 471 (1963), we rejected a rule that any evidence that would not have been obtained but for the illegal actions of the police should be suppressed. See *id.*, at 487–488, 491. Yet in *Brown* v. *Illinois*, 422 U. S. 590 (1975), while continuing to reject a "but-for" rule, see *id.*, at 603, we held that the taint of an unlawful arrest could not be purged merely by warning the arrestee of his right to remain silent and to consult with counsel as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). We explained:

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[23] See 3 W. LaFave, Search and Seizure § 11.4(a) (1978); Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 388–390 (1964); Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 586–589 (1968).

> "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'" 422 U. S., at 602–603 (citation and footnote omitted).

These holdings make it clear that taint questions do not depend merely on questions of causation; causation is a necessary but not a sufficient condition for exclusion. In addition, it must be shown that exclusion is required to remove the incentive for the police to engage in the unlawful conduct. When it is, exclusion is mandated if the Fourth Amendment is to be more than "a form of words."

## IV

The Court concludes that the evidence introduced against petitioners at trial was obtained from a source that was "independent" of the prior illegality—the search warrant. The Court explains that since the police had a legal basis for obtaining and executing the search warrant, the fruits of the authorized search were not produced by exploitation of the prior illegality. *Ante*, at 814–815. There are significant analytical difficulties lurking in the Court's approach. First, the Court accepts the distinction between the evidence obtained pursuant to the warrant and the evidence obtained during the initial illegal entry. *Ante*, at 814; see also *ante*, at 812 (opinion of BURGER, C. J.). I would not draw a distinction between the prewarrant evidence and the post-warrant evidence. The warrant embraced both categories equally and if there had been no unlawful entry, there is no more reason to believe that the evidence in plain view would have remained in the apartment and would have been obtained when the warrant was executed than the evidence that was concealed. The warrant provided an "independent" justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed. The "plain view" items were not actually removed from the apartment until the warrant was executed;[24] thus there was no more interference with petitioners' possessory interest in those items than with their interest in the concealed items. If the execution of a valid warrant takes the poison out of the hidden fruit, I should think that it would also remove the taint from the fruit in plain view.[25]

Second, the Court's holding is inadequate to resolve the claims raised by petitioners. The Court states that the fruits of the judicially authorized search were untainted because "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant." *Ante*, at 814. That is sufficient to dispose only of a claim that petitioners do not make—that the information which led to the issuance of the search warrant was tainted. It does not dispose of the claim that petitioners do make—that the agents' *access* to the fruits of the authorized search, rather than the *information* which led to that search, was a product of illegal conduct. On this question, the length of the delay in obtaining the warrant is surely relevant.

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[24] Tr. 259.

[25] I recognize that the legality of the seizure of the evidence that was in plain view when the officers entered is not before us, but I find it necessary to discuss it since it affects the analysis of the issue that is in dispute. THE CHIEF JUSTICE does so as well; he relies on the deterrent effect of the suppression of the evidence found in plain view in responding to petitioners' argument that the Court of Appeals' decision will encourage illegal entries in the course of securing premises from the inside. *Ante*, at 812.

If Segura had not returned home at all that night, or during the next day, it is probable that the occupants of the apartment would have become concerned and might at least have destroyed the records of their illegal transactions, or removed some of the evidence. If one of the occupants had left the apartment and taken evidence with him or her during the 18–20-hour period prior to the execution of the search warrant, then obviously that evidence would not have been accessible to the agents when the warrant finally was executed.[26] The District Court concluded that there was a possibility that the evidence's availability when the warrant was executed hinged solely on the illegal impoundment. It found: "The evidence would not inevitably have been discovered. In fact, Colon might well have destroyed the evidence had she not been illegally excluded [from the apartment]." App. 15. This finding indicates that there is substantial doubt as to whether all of the evidence that was actually seized would have been discovered if there had been no illegal entry and occupation.

The majority insists that the idea that access to evidence is a relevant consideration is "unsound" because it would "extend" the exclusionary rule and "further 'protect' criminal activity," *ante*, at 816. However, this very point is far from novel; it actually has been the long-settled rule. It is implicit in virtually every case in which we have applied the exclusionary rule. In the seminal case, *Weeks* v. *United States*, 232 U. S. 383 (1914), federal agents illegally entered Weeks' house and seized evidence. The Court ordered the evidence suppressed precisely because absent the illegality, the agents would never have obtained access to the evidence. See *id.*, at 393–394. More recently, in *Payton* v. *New York*, 445 U. S. 573 (1980), we held that suppression was required because the agents were not authorized to enter the house; it was the Fourth Amendment violation that enabled them to obtain access to the evidence. Indeed, we have regularly invoked the exclusionary rule because the evidence would have eluded the police absent the illegality.[27] Here, too, if the evidence would not have been available to the agents at the time they finally executed the warrant had they not illegally entered and impounded petitioners' apartment, then it cannot be said that the agents' access to the evidence was "independent" of the prior illegality.

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[26] It is by no means impossible that at least one of the occupants might have been able to leave the apartment. None of them was known to the agents, and if the agents were located outside the apartment building, they would not have known that a person leaving the building would have come from petitioners' apartment. There were quite a few apartments on each floor of the apartment building. Tr. 253. Moreover, as the District Court noted, the agents could not see petitioners' apartment from their position in the front of the building.

The unlawful delay provides the same justification for suppression as does the unlawful entry: both violations precluded the possibility that evidence would have been moved out of the reach of the agents. We approved of exactly that principle only last Term, in *United States* v. *Place*, 462 U. S. 696 (1983). There, luggage was detained for some 90 minutes until a trained narcotics detection dog arrived. The dog then sniffed the luggage, signaled the presence of narcotics, a warrant was obtained on the strength of the dog's reaction, and when the warrant was executed, narcotics were discovered. The Court held that while the initial seizure was lawful, it became unreasonable because of its duration. Thus, absent the illegality, the authorities would have had to give the luggage back to Place, who would have then taken it away.[28] *The evidence was obtained in violation of the Fourth Amendment because it was the unlawful delay that prevented the evidence from disappearing before it could be obtained by the authorities.* That is precisely the claim made by petitioners here.

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[27] The element of access, rather than information, is central to virtually the whole of our jurisprudence under the Warrant Clause of the Fourth Amendment. In all of our cases suppressing evidence because it was obtained pursuant to a warrantless search, we have focused not on the authorities' lack of appropriate information to authorize the search, but rather on the fact that that information was not presented to a magistrate. Thus, suppression is the consequence not of a lack of information, but of the fact that the authorities' access to the evidence in question was not properly authorized and hence was unconstitutional.

When it finally does confront petitioners' claim concerning the relationship between the unlawful occupation of their apartment and the evidence obtained at the conclusion of that occupation, *ante*, at 815–816, the Court rejects it for two reasons. First, it finds the possibility that the evidence would not have been in the apartment had it not been impounded to be speculative. However, the District Court found a distinct, nonspeculative possibility that the evidence would not have been available to the police had they not entered the apartment illegally. The Court is obligated to respect that finding unless found to be clearly erroneous, which it is not. Indeed, it is equally speculative to assume that the occupants of the apartment would not have become concerned enough to take some action had Segura been missing for 18–20 hours.[29] Second, the Court thinks it "prudentially unsound" to suppress the evidence, noting a certain irony in extending the protection of the Constitution simply because criminals may destroy evidence if given the chance. This analysis confuses two separate issues however: (1) whether the initial entry was justified by exigent circumstances; and (2) whether the discovery of the evidence can be characterized as "inevitable" notwithstanding the 18-hour delay. There is no dispute that the risk of *immediate* destruction did not justify the entry. The argument petitioners make is not that there was some immediate threat of destruction of evidence, but that there was a substantial possibility that over the course of 18–20 hours at least some of the evidence would have been removed or destroyed.[30]

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[28] Even more recently, in *Welsh* v. *Wisconsin*, 466 U. S. 740 (1984), we again employed this concept. The Court held that police could not justify under the Fourth Amendment the warrantless arrest of Welsh, who was suspected of drunken driving, in his own home, "simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id.*, at 754 (footnote omitted).

[29] The Court of Appeals, with which this Court agrees, noted that the District Court's ruling depended on "speculative assumptions," such as that the agents would not have kept the apartment under surveillance after Segura's arrest had they not illegally entered it, that Colon would have

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destroyed the evidence rather than merely removed it from the apartment, or that the evidence could have been destroyed unobtrusively. However, each of these "assumptions" is supported by the evidence. First, the agents would have had no reason to keep the apartment under surveillance subsequent to the arrests of all the persons that they had surveilled, Parra, Rivudalla-Vidal, and Segura. Second, even if Colon had merely removed the evidence from the apartment, there is reason to believe the agents would not have intercepted her. See n. 26, *supra*. Third, since the agents were outside the apartment and would have had no reason to remain on the scene after Segura's arrest, they would not have been around to notice had evidence been removed or destroyed unobtrusively. Moreover, even if it would have been difficult to remove or destroy some of the evidence, such as the triple-beam scale petitioners owned, that does not mean that all of the evidence would have remained in the apartment over the course of an 18–20-hour period. The Court of Appeals' assumptions to the contrary are just as "speculative" as the finding of the District Court.

[30] The cases in the lower courts the majority cites in support of its holding, *ante*, at 814, n. 9, are plainly distinguishable. In *United States* v. *Perez*, 700 F. 2d 1232, 1237–1238 (CA8 1983), the court remanded for a hearing as to whether the search and seizure authorized by a warrant was tainted by prior illegality. In *United States* v. *Kinney*, 638 F. 2d 941, 945 (CA6), cert. denied, 452 U. S. 918 (1981), the court found no taint, but in that case there was no occupation of the searched premises prior to obtaining the warrant and hence no claim of the type made here. The same is true of the other cases the Court cites, *United States* v. *Bosby*, 675 F. 2d

For me, however, the controlling question should not be answered merely on the basis of such speculation, but rather by asking whether the deterrent purposes of the exclusionary rule would be served or undermined by suppression of this evidence. That is the appropriate "prudential" consideration identified in our exclusionary rule cases. The District Court found that there was a distinct possibility that the evidence was preserved only through an illegal occupation of petitioners' apartment. That possibility provides a sufficient reason for asking whether the deterrent rationale of the exclusionary rule is applicable to the second constitutional violation committed by the police in this case.

## V

The importance of applying the exclusionary rule to the police conduct in this case is underscored by its facts. The 18–20-hour occupation of petitioners' home was blatantly unconstitutional. At the same time, the law enforcement justification for engaging in such conduct is exceedingly weak. There can be no justification for inordinate delay in securing a warrant. Thus, applying the exclusionary rule to such conduct would impair no legitimate interest in law enforcement. Moreover, the deterrence rationale of the rule is plainly applicable. The agents impounded this apartment precisely because they wished to avoid risking a loss of access to the evidence within it. Thus, the unlawful benefit they acquired through the impoundment was not so "attenuated" as to make it unlikely that the deprivation of that benefit through the exclusionary rule would have a deterrent effect. To the contrary, it was exactly the benefit identified by the District

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1174, 1180–1181 (CA11 1982); *United States* v. *Fitzharris*, 633 F. 2d 416 (CA5 1980), cert. denied, 451 U. S. 988 (1981); *United States* v. *Agapito*, 620 F. 2d 324, 338 (CA2), cert. denied, 449 U. S. 834 (1980). As the Court concedes, *United States* v. *Lomas*, 706 F. 2d 886 (CA9 1983), and *United States* v. *Allard*, 634 F. 2d 1182 (CA9 1980), are contrary to its holding.

Court—avoiding a risk of loss of evidence—that motivated the agents in this case to violate the Constitution. Thus, the policies underlying the exclusionary rule demand that some deterrent be created to this kind of unconstitutional conduct. Yet the majority's disposition of this case creates none. Under the majority's approach, the agents could have remained indefinitely—impounding the apartment for a week or a month—without being deprived of the advantage derived from the unlawful impoundment. We cannot expect such an approach to prevent similar violations of the Fourth Amendment in the future.

In my opinion the exclusionary rule should be applied to both of the constitutional violations to deprive the authorities of the advantage they gained as a result of their unconstitutional entry and impoundment of petitioners' apartment. The deterrence rationale of the exclusionary rule requires suppression unless the Government can prove that the evidence in fact would have remained in the apartment had it not been unlawfully impounded. The risk of uncertainty as to what would have happened absent the illegal conduct posed by the facts of this case should be borne by the party that created that uncertainty, the Government. That is the teaching of our exclusionary rule cases. See *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982); *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979); *Brown* v. *Illinois*, 422 U. S., at 604.

Further proceedings are necessary in this case if petitioners' claim is to be properly evaluated. The District Court found only that there was a demonstrable possibility that the evidence obtained during the execution of the search warrant would have been destroyed absent the illegal entry and impoundment. While this finding is sufficient to establish prima facie that the Government exploited the illegality by avoiding a risk of losing the evidence in the apartment, the existence of a mere possibility cannot be equated with an ultimate finding that such exploitation did in fact occur. The

District Court made no specific finding as to whether the Government had demonstrated that the evidence obtained pursuant to the search warrant would have remained in the apartment had the agents not illegally entered and impounded it. It may be that an evidentiary hearing would be necessary to supplement the record on this point. Accordingly, I would remand this case to the Court of Appeals with instructions that it be remanded to the District Court for further proceedings.

## VI

The Government did not contest the blatant unconstitutionality of the agents' conduct in this case. Nevertheless, today's holding permits federal agents to benefit from that conduct by avoiding the risk that evidence would be unavailable when the search warrant was finally executed. The majority's invocation of the "enormous price" of the exclusionary rule and its stated unwillingess to "protect criminal activity," *ante*, at 816, is the most persuasive support that the Court provides for its holding. Of course, the Court is quite right to be ever mindful of the cost of excessive attention to procedural safeguards. But an evenhanded approach to difficult cases like this requires attention to countervailing considerations as well. There are two that I would stress.

First, we should consider the impact of the Court's holding on the leaders of the law enforcement community who have achieved great success in creating the kind of trained, professional officers who deservedly command the respect of the communities they serve. The image of the "keystone cop" whose skills seldom transcended the ham-handed employment of the "third degree" is largely a matter of memory for those of us who lived through the 1920's, 1930's and 1940's. For a congeries of reasons, among which unquestionably is the added respect for the constitutional rights of the individual engendered by cases like *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the professionalism that has always characterized the Federal

Bureau of Investigation is now typical of police forces throughout the land. A rule of law that is predicated on the absurd notion that a police officer does not have the skill required to obtain a valid search warrant in less than 18 or 20 hours, or that fails to deter the authorities from delaying unreasonably their attempt to obtain a warrant after they have entered a home, is demeaning to law enforcement and can only encourage sloppy, undisciplined procedures.

Second, the Court's rhetoric cannot disguise the fact that when it not only tolerates but also provides an affirmative incentive for warrantless and plainly unreasonable and unnecessary intrusions into the home, the resulting erosion of the sanctity of the home is a "price" paid by the innocent and guilty alike.[31] More than half a century ago, Justice Holmes explained why the Government cannot be permitted to benefit from its violations of the Constitution.

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

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[31] The words that this case calls to my mind are not those of *Nardone*, *ante*, at 816, but rather those in two of Justice Jackson's dissents. With respect to the claim that the Fourth Amendment "protect[s] criminal activity," he wrote: "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. . . . Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman." *Brinegar* v. *United States*, 338 U. S. 160, 181 (1949). And with respect to the "price" exacted by the exclusionary rule, he wrote: "[T]he forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught." *Harris* v. *United States*, 331 U. S. 145, 198 (1947).

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, . . . the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391–392 (1920) (citation omitted).

If we are to give more than lipservice to protection of the core constitutional interests that were twice violated in this case, some effort must be made to isolate and then remove the advantages the Government derived from its illegal conduct.

I respectfully dissent.

# SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 83–276. Argued April 23, 1984—Decided July 5, 1984

Section 12(f) of the Military Selective Service Act denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students between the ages of 18 and 26 who fail to register for the draft. Section 12(f)(2) requires applicants for Title IV assistance to file a statement with their institutions of higher education attesting to their compliance with the Act and implementing regulations. A Presidential Proclamation requires young men to register for the draft within 30 days of their 18th birthday. Failure to register within this time is a criminal offense. The regulations permit late registrants to establish eligibility for Title IV assistance. Appellee students (hereafter appellees), who have not registered for the draft, brought suits in Federal District Court seeking to enjoin the enforcement of § 12(f). The District Court granted the requested relief, holding that the regulations making late registrants eligible for Title IV aid were inconsistent with the statute, and that § 12(f) is an unconstitutional bill of attainder because it singles out an identifiable group that would be ineligible for Title IV aid based on their failure to register. Alternatively, the District Court held that § 12(f) also violated appellees' Fifth Amendment privilege against compelled self-incrimination.

*Held:*

1. Section 12(f) is not a bill of attainder. Pp. 846–856.

(a) A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468. Pp. 846–847.

(b) Section 12(f) does not single out nonregistrants and make them ineligible for Title IV aid based on their past conduct, *i. e.*, failure to register. The section does not require registration within the time fixed by the Presidential Proclamation and does not make late registrants ineligible for aid. The contrary view is inconsistent with § 12(f)'s structure and with the legislative history. Section 12(f) clearly gives nonregistrants 30 days after receiving notice that they are ineligible for Title IV aid to register for the draft and qualify for aid. The legislative history shows that Congress' purpose in enacting § 12(f) was to encourage registration by those who must register but have not yet done so. Section 12(f)'s requirements are not irreversible but can be met readily by either timely or late registration. *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, distinguished. Pp. 847–851.

(c) Section 12(f) does not inflict punishment within the meaning of the Bill of Attainder Clause. It imposes none of the burdens historically associated with punishment. It does not even deprive appellees of Title IV benefits permanently, since it leaves open perpetually the possibility of qualifying for aid. Pp. 852–853.

(d) The legislative history shows that § 12(f) was intended to further nonpunitive legislative goals. Conditioning receipt of Title IV aid on draft registration is plainly a rational means to improve compliance with the registration requirements. Section 12(f) also promotes a fair allocation of scarce federal resources by limiting Title IV aid to those who are willing to meet their responsibilities to the United States by registering for the draft when required to do so. Pp. 853–856.

2. Section 12(f) does not violate appellees' Fifth Amendment privilege against compelled self-incrimination. Since a student who has not registered for the draft is bound to know that he would be denied Title IV aid, he is no sense under any "compulsion" to seek that aid and has no reason to make any statement to anyone as to whether or not he has registered. As to a late registrant, since the law does not require him to disclose to his educational institution whether or not he registered late, he is not required to disclose any incriminating information in order to become eligible for aid. The fact that appellees must register late in order to get Title IV aid and thus reveal to the Selective Service their failure to comply timely with the registration requirements does not violate appellees' Fifth Amendment rights. They have not been denied the opportunity to register and have not been disqualified for financial aid for asserting a constitutional privilege. *Lefkowitz* v. *Turley*, 414 U. S. 70, distinguished. Appellees, not having sought to register, have had no occasion to assert their Fifth Amendment privilege when asked to state their dates of birth, nor has the Government refused any request for immunity for their answers or otherwise threatened them with penalties for invoking the privilege. Under these circumstances, appellees will not be heard to complain that § 12(f) violates their Fifth Amendment rights by forcing them to acknowledge during the draft registration process they have avoided that they have registered late. Pp. 856–858.

557 F. Supp. 937, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Parts I, II–B, III, and IV of which POWELL, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 859. BREN-

**NAN**, J., *post*, p. 862, and **MARSHALL**, J., *post*, p. 862, filed dissenting opinions. **BLACKMUN**, J., took no part in the decision of the case.

*Solicitor General Lee* argued the cause for appellants. With him on the briefs were *Acting Assistant Attorney General Willard, Deputy Solicitor General Bator, John H. Garvey,* and *Neil H. Koslowe.*

*William J. Keppel* argued the cause for appellees. With him on the brief was *E. Gail Suchman.**

**CHIEF JUSTICE BURGER** delivered the opinion of the Court.

We noted probable jurisdiction to decide (a) whether § 12(f) of the Military Selective Service Act, 96 Stat. 748, 50 U. S. C. App. § 462(f), which denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students who fail to register for the draft under the Act, is a bill of attainder; and (b) whether § 12(f) compels those students who elect to request federal aid to incriminate themselves in violation of the Fifth Amendment.

## I

Section 3 of the Military Selective Service Act, 62 Stat. 605, as amended, 50 U. S. C. App. § 453, empowers the President to require every male citizen and male resident alien between the ages of 18 and 26 to register for the draft. Sections 12(b) and (c) of that Act impose criminal penalties for failure to register. On July 2, 1980, President Carter issued a Proclamation requiring young men to register within 30 days of their 18th birthday. Presidential Proclamation No. 4771, 3 CFR 82 (1981).

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**Peter B. Ellis* filed a brief for the Trustees of Boston University as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Swarthmore College et al. by *Thomas P. Preston* and *Robert D. Williams;* and for the University of Minnesota et al. by *Stephen S. Dunham, William P. Donohue, Roderick K. Daane, Patricia Eames,* and *James D. Miller.*

Appellee students (hereafter appellees) are anonymous individuals who were required to register before September 1, 1982. On September 8, Congress enacted the Department of Defense Authorization Act of 1983, Pub. L. 97–252, 96 Stat. 718. Section 1113(a) of that Act added § 12(f) to the Military Selective Service Act. Section 12(f)(1) provides that any person who is required to register and fails to do so "in accordance with any proclamation" issued under the Military Selective Service Act "shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965."[1] Section 12(f)(2) requires applicants for Title IV assistance to file with their institutions of higher education a statement attesting to their compliance with the draft registration law and regulations issued under it. Sections 12(f)(3) and (4) require the Secretary of Education, in agreement with the Director of Selective Service, to prescribe methods for verifying such statements of compliance and to issue implementing regulations.

Regulations issued in final form on April 11, 1983, see 48 Fed. Reg. 15578, provide that no applicant may receive Title IV aid unless he files a statement of compliance certifying that he is registered with the Selective Service or that, for a specified reason, he is not required to register. 34 CFR § 668.24(a) (1983). The regulations allow a student who has not previously registered, although required to do so, to establish eligibility for Title IV aid by registering, filing a statement of registration compliance, and, if required, verifying that he is registered. § 668.27(b)(1). The statement of compliance does not require the applicant to state the date that he registered.[2]

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[1] Title IV of the Higher Education Act of 1965, 20 U. S. C. § 1070 *et seq.*, provides financial assistance to qualified students in postsecondary educational programs. Title IV aid is available at both colleges and universities, as well as at numerous kinds of business, trade, and technical schools. §§ 1085(b), (c), 1088.

[2] The regulations include a model statement of registration compliance that the Secretary of Education has indicated satisfies the requirements of 34 CFR § 668.24(a) (1983):

In November 1982 the Minnesota Public Interest Research Group filed a complaint in the United States District Court for the District of Minnesota seeking to enjoin the operation of § 12(f). The District Court dismissed the Minnesota Group for lack of standing but allowed three anonymous students to intervene as plaintiffs. 557 F. Supp. 923 (1983); 557 F. Supp. 925 (1983). The intervenors alleged that they reside in Minnesota, that they need financial aid to pursue their educations, that they intend to apply for Title IV assistance, and that they are legally required to register with the Selective Service but have failed to do so. This suit was informally consolidated with a separate action brought by three other anonymous students making essentially the same allegations as the intervenors.

In March 1983 the District Court granted a preliminary injunction restraining the Selective Service System from enforcing § 12(f). After finding that appellees had demonstrated a threat of irreparable injury, the court held that appellees were likely to succeed on the merits. First, the District Court thought it likely that § 12(f) was a bill of attain-

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“STATEMENT OF EDUCATIONAL PURPOSE/
REGISTRATION COMPLIANCE

. . . . .

“____ I certify that I am not required to be registered with Selective Service, because:

“____ I am female.

“____ I am in the armed services on active duty (Note: Members of the Reserves and National Guard are not considered on active duty.)

“____ I have not reached my 18th birthday.

“____ I was born before 1960.

“____ I am a permanent resident of the Trust Territory of the Pacific Islands or the Northern Mariana Islands.

“____ I certify that I am registered with Selective Service.

“Signature: ____________________

“Date: ____________________

“NOTICE: You will not receive title IV financial aid unless you complete this statement and, if required, give proof to your school of your registration compliance. . . .” 34 CFR § 668.25 (1983).

der. The court interpreted the statutory bar to student aid as applicable to students who registered late. Thus interpreted, the statute "clearly singles out an ascertainable group based on past conduct" and "legislatively determines the guilt of this ascertainable group." *Doe* v. *Selective Service System*, 557 F. Supp. 937, 942, 943 (1983). The court viewed the denial of aid as punishment within the meaning of the Bill of Attainder Clause because it "deprives students of the practical means to achieve the education necessary to pursue many vocations in our society." *Id.*, at 944. Second, the District Court found it likely that § 12(f) violated appellees' Fifth Amendment privilege against compelled self-incrimination. In the District Court's view, the statement of compliance required by § 12(f)(2) compels students who have not registered for the draft and need financial aid to confess to the fact of nonregistration, which is a crime. 50 U. S. C. App. § 462(a).

On June 16, 1983, the District Court entered a permanent, nationwide injunction against the enforcement of § 12(f). The court held that the regulations making late registrants eligible for aid were inconsistent with the statute and concluded that the statute was an unconstitutional attainder. It also held the statute to violate appellees' constitutional privilege against compelled self-incrimination.

On June 29, we stayed the District Court's June 16 order pending the timely docketing and final disposition of this appeal. *Selective Service System* v. *Doe*, 463 U. S. 1215. We noted probable jurisdiction on December 5, 1983, 464 U. S. 1006, and we reverse.

## II

The District Court held that § 12(f) falls within the category of congressional actions that Art. I, § 9, cl. 3, of the Constitution bars by providing that "[n]o Bill of Attainder . . . shall be passed." A bill of attainder was most recently described by this Court as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial," *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468 (1977); see *United States* v. *O'Brien*, 391 U. S. 367, 383, n. 30 (1968); *United States* v. *Lovett*, 328 U. S. 303, 315 (1946). Appellants argue that § 12(f) does not satisfy any of these three requirements, *i. e.*, specification of the affected persons, punishment, and lack of a judicial trial.[3]

### A

In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial "specifically designated persons or groups." *United States* v. *Brown*, 381 U. S. 437, 447 (1965). Historically, bills of attainder generally named the persons to be punished. However, "[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of United States* v. *Subversive Activities Control Board*, 367 U. S. 1, 86 (1961). When past activity serves as "a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" for punishment, *id.*, at 87, the Act may be an attainder. See *Cummings* v. *Missouri*, 4 Wall. 277, 324 (1867).

In *Cummings* the Court struck down a provision of the Missouri post-Civil War Reconstruction Constitution that barred persons from various professions unless they stated under oath that they had not given aid or comfort to persons engaged in armed hostility to the United States and had never "'been a member of, or connected with, any order, society, or organization, inimical to the government of the United States.'" *Id.*, at 279. The Court recognized that the oath was required, not "as a means of ascertaining whether parties were qualified" for their professions, *id.*, at 320, but rather to effect a punishment for having associated with the Confederacy. Although the State Constitution did not mention the persons or groups required to take the oath by name, the Court concluded that in creating a qualification having no possible relation to their fitness for their chosen professions, the Constitution was intended "to reach the person, not the calling." *Ibid.*

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[3] We agree with appellants that the statute does not single out an identifiable group and that the denial of Title IV aid does not constitute punishment. Appellants also argue that § 12(f) does not dispense with a judicial trial, noting that a hearing is provided in the event of disagreement between the applicant and the Secretary about whether the applicant has registered, § 12(f)(4), and that the decision made at that hearing is subject to judicial review. Appellants' argument is meritless. Congress has not provided a judicial trial to those affected by the statute.

On the same day that it decided *Cummings*, the Court struck down a similar oath that was required for admission to practice law in the federal courts. *Ex parte Garland*, 4 Wall. 333 (1867). Like the oath considered in *Cummings*, the oath "operate[d] as a legislative decree of perpetual exclusion" from the practice of law, *id.*, at 377, since past affiliation with the Confederacy prevented attorneys from taking the oath without perjuring themselves. See *Cummings* v. *Missouri*, *supra*, at 327. In both *Cummings* and *Garland*, the persons in the group disqualified were defined entirely by irreversible acts committed by them.

The District Court in this case viewed § 12(f) as comparable to the provisions of the Reconstruction laws declared unconstitutional in *Cummings* and *Garland*, because it thought the statute singled out nonregistrants and made them ineligible for aid based on their past conduct, *i. e.*, failure to register. To understand the District Court's analysis, it is necessary to turn to its construction of the statute. The court noted that § 12(f) disqualifies applicants for financial assistance unless they have registered "in accordance with any proclamation issued under [§ 3 of the Military Selective Service Act]," and that Proclamation No. 4771 requires those born after January 1, 1963, to register within 30 days of their 18th birthday. See 3 CFR 82 (1981). In the court's view, the language of § 12(f), coupled with the Proclamation's 30-day registration requirement, precluded late registrants from qualifying for Title IV aid. Having construed § 12(f) as precluding late registration, the District Court read the statute to be retrospective, in that it denies financial assistance to an identifiable group—nonregistrants—based on their past conduct. The District Court acknowledged that implementing regulations would allow students who had not previously registered to become eligible for Title IV benefits by registering, see 34 CFR § 668.27(b)(1) (1983), but the court declared those regulations to be void because they conflicted with what the District Court viewed as § 12(f)'s requirement of registration within the time prescribed by Proclamation No. 4771.

We reject the District Court's view that § 12(f) requires registration within the time fixed by Proclamation No. 4771. That view is plainly inconsistent with the structure of § 12(f) and with the legislative history. Subsection (f)(4) of the statute requires the Secretary of Education to issue regulations providing that "any person" to whom the Secretary proposes to deny Title IV assistance shall be given notice of the proposed denial and "not less than thirty days" after such notice to "establis[h] that he has complied with the registration requirement." 50 U. S. C. App. § 462(f)(4). The statute clearly gives nonregistrants 30 days after receiving notice that they are ineligible for Title IV aid to register for the draft and qualify for aid. See 34 CFR § 668.27(b)(1) (1983). To require registration within the *time* fixed by the Presidential Proclamation would undermine this provision allowing "any person" 30 days *after notification* to establish compliance with the registration requirement. This was clearly a grace period.

The District Court also ignored the relevant legislative history. Congress' purpose in enacting § 12(f) was to encourage registration by those who must register, but have not yet done so.[4] Proponents of the legislation emphasized that those failing to register timely can qualify for aid by registering late.[5] The District Court failed to take account of this legislative purpose. See *Heckler* v. *Edwards*, 465 U. S. 870 (1984). Nor did its construction of § 12(f) give adequate deference to the views of the Secretary of Education, who had helped to draft the statute. *Miller* v. *Youakim*, 440 U. S. 125, 144 (1979); see 128 Cong. Rec. 18363 (1982) (remarks of Rep. Solomon).

The judicial function is "not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations," *CSC* v. *Letter Carriers*, 413 U. S. 548, 571 (1973).[6] Section 12(f) does not make late registrants ineligible for Title IV aid.

Because it allows late registration, § 12(f) is clearly distinguishable from the provisions struck down in *Cummings* and *Garland.*[7] *Cummings* and *Garland* dealt with absolute barriers to entry into certain professions for those who could not file the required loyalty oaths; no one who had served the Confederacy could possible comply, for his status was irreversible. By contrast, § 12(f)'s requirements, far from irreversible, can be met readily by either timely or late filing. "Far from attaching to . . . past and ineradicable actions," ineligibility for Title IV benefits "is made to turn upon continuingly contemporaneous fact" which a student who wants public assistance can correct. *Communist Party of United States* v. *Subversive Activities Control Board*, 367 U. S., at 87.

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[4] 128 Cong. Rec. 18356 (1982) (remarks of Rep. Whitehurst); *ibid.* (remarks of Rep. Solomon); *id.*, at 18369 (remarks of Rep. Stratton); *id.*, at 9664 (remarks of Sen. Hayakawa); *id.*, at 9666 (remarks of Sen. Jepsen).

[5] *Id.*, at 18356 (remarks of Rep. Whitehurst); *id.*, at 18357 (remarks of Rep. Simon); *id.*, at 18368 (remarks of Rep. Montgomery); *id.*, at 18369 (remarks of Rep. Stratton). As Senator Stennis stated:

"I thought of the proposition here where some youngster might have overlooked signing up or might have misunderstood it or had not been correctly informed, but he is not going to be penalized for that because he still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible so far as this prohibition or restriction is concerned." *Id.*, at 9666.

[6] As the Solicitor General points out, one construction of the statute that avoids a constitutional problem is to make aid contingent on registration *in the manner*, but not the time, required by any proclamation. See Presidential Proclamation No. 4771, 3 CFR 84 (1981) ("Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service").

[7] All of the appellees in this case had failed to comply with the registration requirements when § 12(f) was enacted. As to 18-year-olds who have

### B

Even if the specificity element were deemed satisfied by § 12(f), the statute would not necessarily implicate the Bill of Attainder Clause. The proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group. In determining whether a statute inflicts punishment within the proscription against bills of attainder, our holdings recognize that the severity of a sanction is not determinative of its character as punishment. *Flemming* v. *Nestor*, 363 U. S. 603, 616, and n. 9 (1960). That burdens are placed on citizens by federal authority does not make those burdens punishment. *Nixon* v. *Administrator of General Services*, 433 U. S., at 470; *United States* v. *Lovett*, 328 U. S., at 324 (Frankfurter, J., concurring).[8] Conversely, legislative intent to encourage compliance with the law does not establish that a statute is merely the legitimate regulation of conduct. Punishment is not limited solely

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entered the class of nonregistrants after August 9, 1982—30 days before the enactment of § 12(f)—the statute is clearly prospective; ineligibility for financial aid is merely a deprivation in addition to potential criminal liability for the failure to register for the draft.

[8] "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation." 328 U. S., at 324.

to retribution for past events, but may involve deprivations inflicted to deter future misconduct. *United States* v. *Brown*, 381 U. S., at 458–459. It is thus apparent that, though the governing criteria for an attainder may be readily indicated, "each case has turned on its own highly particularized context." *Flemming* v. *Nestor*, *supra*, at 616.

In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." *Nixon*, *supra*, at 473, 475–476, 478. We conclude that under these criteria § 12(f) is not a punitive bill of attainder.

### 1

At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bills of pains and penalties. The Constitution proscribes these lesser penalties as well as those imposing death. *Cummings* v. *Missouri*, 4 Wall., at 323. Historically used in England in times of rebellion or "violent political excitements," *ibid.*, bills of pains and penalties commonly imposed imprisonment, banishment, and the punitive confiscation of property. *Nixon*, *supra*, at 474. In our own country, the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions.[9]

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[9] See, *e. g.*, *United States* v. *Brown*, 381 U. S. 437 (1965), in which Communist Party members were barred from offices in labor unions; *United States* v. *Lovett*, 328 U. S. 303 (1946), in which the law in question cut off salaries to three named Government employees; *Cummings* v. *Missouri*, 4 Wall. 277 (1867), in which a priest was disqualified from practicing as a clergyman; and *Ex parte Garland*, 4 Wall. 333 (1867), in which lawyers were barred from the practice of law.

Section 12(f) imposes none of the burdens historically associated with punishment. As this Court held in *Flemming* v. *Nestor*, *supra*, at 617, "the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed," and Congress has inflicted "nothing approaching the 'infamous punishment' of imprisonment" or other disabilities historically associated with punishment.[10]

Congress did not even deprive appellees of Title IV benefits permanently; appellees can become eligible for Title IV aid at any time simply by registering late and thus "carry the keys of their prison in their own pockets." *Shillitani* v. *United States*, 384 U. S. 364, 368 (1966). A statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of forbidden legislative punishment.

### 2

Our inquiry does not end with a determination that § 12(f) does not inflict punishment in its historical sense. To ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder, we must determine whether the challenged statute can be reasonably said to further nonpunitive goals. *Nixon*, 433 U. S., at 475–476.

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[10] Appellees argue that the underpinnings of *Flemming* have been removed by *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970), and *Mathews* v. *Eldridge*, 424 U. S. 319, 332 (1976). *Goldberg* held only that public assistance "benefits are a matter of statutory entitlement for persons qualified to receive them," 397 U. S., at 262, and that due process affords qualified recipients a pretermination evidentiary hearing to guard against erroneous termination. The Court stressed that "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.*, at 264 (emphasis in original). *Mathews* reached the same conclusion with respect to disability benefits. Even *Flemming* noted that the interest of a covered employee under the Social Security Act "fall[s] within the protection from arbitrary governmental action afforded by the Due Process Clause," 363 U. S., at 611, while holding that Congress' disqualification of certain deportees from receipt of Social Security benefits was not an attainder, *id.*, at 617.

The legislative history reflects that § 12(f) represents the considered congressional decision to further nonpunitive legislative goals. Congress was well aware that more than half a million young men had failed to comply with the registration requirement.[11] The legislators emphasized that one of the primary purposes of § 12(f) was to encourage those required to register to do so.[12]

Conditioning receipt of Title IV aid on registration is plainly a rational means to improve compliance with the registration requirement. Since the group of young men who must register for the draft overlaps in large part with the group of students who are eligible for Title IV aid,[13] Congress reasonably concluded that § 12(f) would be a strong tonic to many nonregistrants.

Section 12(f) also furthers a fair allocation of scarce federal resources by limiting Title IV aid to those who are willing to meet their responsibilities to the United States by registering with the Selective Service when required to do so. As one Senator stated:

> "This amendment seeks not only to increase compliance with the registration requirement but also to insure the most fair and just usage of Federal education benefits.

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[11] See, *e. g.*, 128 Cong. Rec. 18356 (1982) (remarks of Rep. Solomon); *id.*, at 9666 (remarks of Sen. Jepsen).

[12] See *id.*, at 18356 (remarks of Rep. Solomon); *id.*, at 18369 (remarks of Rep. Stratton); *id.*, at 9664 (remarks of Sen. Hayakawa); *id.*, at 9666 (remarks of Sen. Stennis); *ibid.* (remarks of Sen. Jepsen).

[13] The Military Selective Service Act, 50 U. S. C. App. § 453, requires certain males between the ages of 18 and 26 to register. Those who fail to register, though required to do so, are a significant part of the class to which Title IV assistance is otherwise offered. Title IV aid is available for a broad range of postsecondary educational programs at colleges, universities, and vocational schools. 20 U. S. C. § 1085(a); see n. 1, *supra*.

> During these times of extreme budgetary constraints, times when even the most worthwhile programs are cut back drastically, this Government has every obligation to see that Federal dollars are spent in the most fair and prudent manner possible. . . . If students want to further their education at the expense of their country, they cannot expect these benefits to be provided without accepting their fair share of the responsibilities to that Government." [14]

Certain aspects of the legislation belie the view that § 12(f) is a punitive measure. Section 12(f) denies Title IV benefits to innocent as well as willful nonregistrants. Yet punitive legislation ordinarily does not reach those whose failure to comply with the law is not willful. Thus, in stressing that the legislation would reach unintentional violators, 128 Cong. Rec. 18355–18356 (1982) (remarks of Rep. Solomon); *id.*, at 18357 (remarks of Rep. Simon); *id.*, at 9666 (remarks of Sen. Stennis), proponents indicated that they intended to regulate *all* nonregistrants, rather than to single out intentional nonregistrants for punishment. In this same nonpunitive spirit, Congress also allowed *all* nonregistrants to qualify for Title IV aid simply by registering late, instead of choosing to punish willful nonregistrants by denying them benefits even if they registered belatedly.

We see therefore that the legislative history provides convincing support for the view that, in enacting § 12(f) Congress sought, not to punish anyone,[15] but to promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources. Section 12(f) clearly furthers nonpunitive legislative goals.

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[14] 128 Cong. Rec. 9664–9665 (1982) (remarks of Sen. Hayakawa); see also *id.*, at 9664 (remarks of Sen. Mattingly); *id.*, at 18356 (remarks of Rep. Montgomery).

[15] Applying the third part of the *Nixon* test, the District Court concluded that § 12(f) is a punitive measure. But the District Court relied in part on the statements of legislators who opposed the statute because they thought the statute punished nonregistrants. 128 Cong. Rec. 18358–18359 (1982) (remarks of Rep. Edgar); *id.*, at 18359–18360 (remarks of

### C

Because § 12(f) does not single out an identifiable group that would be ineligible for Title IV aid or inflict punishment within the meaning of Bill of Attainder Clause, we hold that the District Court erred in striking down § 12(f) as an impermissible attainder.

## III

Appellees assert that § 12(f) violates the Fifth Amendment by compelling nonregistrants to acknowledge that they have failed to register timely when confronted with certifying to their schools that they have complied with the registration law. Pointing to the fact that the willful failure to register within the time fixed by Proclamation No. 4771 is a criminal offense punishable under §§ 12(a) and (b), they contend that § 12(f) requires them—since in fact they have not registered—to confess to a criminal act and that this is "compulsion" in violation of their Fifth Amendment rights.

However, a person who has not registered clearly is under no compulsion to seek financial aid; if he has not registered, he is simply ineligible for aid. Since a nonregistrant is bound

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Rep. Goldwater); *id.*, at 9666 (remarks of Sen. Durenberger). These statements are entitled to little, if any, weight, since they were made by opponents of the legislation. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951).

The District Court also relied on several isolated statements expressing understandable indignation over the decision of some nonregistrants to show their defiance of the law. See 128 Cong. Rec. 18356 (1982) (remarks of Rep. Montgomery); *id.*, at 9665 (remarks of Sen. Hayakawa). But such statements do not constitute "the unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down." *Flemming* v. *Nestor*, 363 U. S. 603, 619 (1960).

to know that his application for federal aid would be denied, he is in no sense under any "compulsion" to seek that aid. He has no reason to make any statement to anyone as to whether or not he has registered.

If appellees decide to register late, they could, of course, obtain Title IV aid without providing any information to their school that would incriminate them, since the statement to the school by the applicant is simply that he is in compliance with the registration law; it does not require him to disclose whether he was a timely or a late registrant. See n. 2, *supra*. A late registrant is therefore not required to disclose any incriminating information in order to become eligible for aid.

Although an applicant who registers late need not disclose that fact in his application for financial aid, appellants concede that a late registrant must disclose that his action is untimely when he makes a late registration with the Selective Service; the draft registration card must be dated and contain the registrant's date of birth. 32 CFR § 1615.4 (1983). This raises the question whether § 12(f) violates appellees' Fifth Amendment rights because they must register late in order to get aid and thus reveal to the Selective Service the failure to comply timely with the registration law. Appellees contend that, under our holding in *Lefkowitz* v. *Turley*, 414 U. S. 70, 83–84 (1973), the very risk that they will be ineligible for financial aid constitutes "compulsion" within the meaning of the Fifth Amendment.

In *Turley* we held that "the plaintiffs' [architects'] disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights." *Id.*, at 83. However, nonregistrants such as appellees are not in the same position as potential public contractors in *Turley*. An 18-year-old male who refuses to register is, of course, subject to prosecution for failure to register, but he is not compelled by law to acknowledge his failure to comply. Only when he registers—including a late registration—will he be asked to state his date of birth and thus acknowledge that he did not timely register.

None of these appellees has registered and thus none of them has been confronted with a need to assert a Fifth Amendment privilege when asked to disclose his date of birth. Unlike the architects in *Turley*, these appellees have not been denied the opportunity to register and in no sense have they been disqualified for financial aid "for asserting a constitutional privilege." *Ibid.*

It is well settled that, "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself," *Minnesota* v. *Murphy*, 465 U. S. 420, 427 (1984); "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying," *Gardner* v. *Broderick*, 392 U. S. 273, 276 (1968). However, these appellees, not having sought to register, have had no occasion to assert their Fifth Amendment privilege when asked to state their dates of birth; the Government has not refused any request for immunity for their answers or otherwise threatened them with penalties for invoking the privilege as in *Turley*. Under these circumstances, § 12(f) does not violate their Fifth Amendment rights by forcing them to acknowledge during the registration process they have avoided that they have registered late.[16]

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[16] The dissent reads *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), to create in this case an exception to the normal rule requiring assertion of the Fifth Amendment privilege. In *Marchetti* and *Grosso*, however, anyone who asserted the privilege on a wagering return did not merely call attention to himself; the very filing necessarily admitted illegal gambling activity. Those cases are therefore clearly distinguishable on their facts. See *Grosso*, at 73 (BRENNAN, J., concurring); *United States* v. *Sullivan*, 274 U. S. 259, 263 (1927).

## IV

We conclude that § 12(f) does not violate the proscription against bills of attainder. Nor have appellees raised a cognizable claim under the Fifth Amendment.[17]

The judgment of the District Court is

*Reversed.*

JUSTICE BLACKMUN took no part in the decision of this case.

JUSTICE POWELL, concurring in part and concurring in the judgment.

I do not disagree with the holding or, indeed, with most of the Court's opinion. As I view this case, however, the bill of attainder issue can and should be disposed of solely on the ground that § 12(f) of the Military Selective Service Act, as added by § 1113(a) of the Department of Defense Authorization Act of 1983, is not *punitive* legislation.

Unless § 12(f) is punitive in its purpose and effect, there is no bill of attainder. *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 472 (1977). The term "punitive" connotes punishment as for a crime. Young men who knowingly have failed to comply with the registration requirements of the Selective Service Act have committed a crime for which the Act itself provides the only punishment.[1] Section 12(f) is in no sense punitive; it authorizes no punishment in any normal or general acceptance of that familiar term. Rather, it provides a benefit at the expense of taxpayers generally for those who request and qualify for it. There is no compulsion to request the benefit. No minority or disfavored group is singled out by Congress for disparate treatment.

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[17] Appellees also assert that § 12(f) violates equal protection because it discriminates against less wealthy nonregistrants. That argument is meritless. Section 12(f) treats all nonregistrants alike, denying aid to both the poor and the wealthy. But even if the statute discriminated against poor nonregistrants because more wealthy nonregistrants could continue to pay for their postsecondary educations, the statute must be sustained if rationally related to a legitimate Government interest. *Harris* v. *McRae*, 448 U. S. 297, 322–324 (1980). That standard is easily met here, because § 12(f) is rationally related to the legitimate Government objectives of encouraging registration and fairly allocating scarce federal resources. See *supra*, at 854.

Section 12(f) applies broadly and equally to every male citizen and resident alien who upon attaining 18 years of age is required by Presidential order to register with the Selective Service.[2] As its legislative history makes clear, § 12(f) was enacted to encourage compliance with the Military Selective Service Act, leaving punishment for failure to comply entirely to the provisions of the Act itself and to the normal enforcement provisions provided by law. The Court observes that Congress by § 12(f) has adopted a "rational means" to encourage compliance with law. *Ante*, at 854. It is encouragement only; not compulsion. Moreover, the interest of Government—indeed of the people of our country—

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[1] Section 12 of the Military Selective Service Act provides, in relevant part:

"[A]ny person who . . . evades or refuses registration or service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ." 50 U. S. C. App. § 462(a).

[2] Young men in the United States are required only to *register* for military service when most of the other major countries of the world require this service. In the North Atlantic Treaty Organization, for example, the following countries have compulsory military service: Belgium, Denmark, France, Greece, Italy, Netherlands, Norway, Portugal, Spain, Turkey, and West Germany. Switzerland also has compulsory service as do—of course—all the Communist countries. See The International Institute for Strategic Studies, The Military Balance 1983–1984 (1983).

in providing for national security is *compelling.* It has been recognized as such from the earliest days of the Republic.[3] The Preamble of the Constitution declares that one of the Framers' purposes was to "provide for the common defence."[4]

As I find that § 12(f) is punitive neither in its purpose nor in its effect, it is unnecessary in my view to reach the other arguments addressed by the Court on the bill of attainder issue.[5] I add, however, that I do not disagree with the

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[3] The Federalist Papers, the essays arguing in favor of adoption of the Constitution, are replete with emphasis on the need for a national government to provide for defense by raising and maintaining armed forces. In John Jay's prescient Paper, No. 4, he observed: The "safety of the people of America against dangers from foreign forces depends not only on [our] forbearing to give *just* causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to *invite* hostility . . . . It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; [and] absolute monarchs will often make war when their nations are to get nothing by it . . . ." The Federalist No. 4, pp. 18–19 (J. Cooke ed. 1961) (emphasis in original).

Many of the opponents of the national union argued against "the *raising* of armies in time of peace." Responding to this argument, Alexander Hamilton answered that the "United States would then exhibit the most extraordinary spectacle which the world has yet seen—that of a nation incapacitated by its constitution to prepare for defence before it was actually invaded." The Federalist No. 25, p. 161 (J. Cooke ed. 1961). Hamilton also spoke of the danger of "expos[ing] our property and liberty to the mercy of foreign invaders and invit[ing] them, by our weakness, [to attack our country]." *Ibid.;* see also The Federalist No. 24 (A. Hamilton).

[4] Article I, § 8, of the Constitution expressly empowers Congress, in a single clause, "to pay the Debts and provide for the common Defense and general Welfare of the United States."

[5] In support of their contention that § 12(f) is a form of punishment, appellees cite *Ex parte Garland,* 4 Wall. 333 (1867), *Cummings* v. *Missouri,* 4 Wall. 277 (1867), and *United States* v. *Lovett,* 328 U. S. 303 (1946). In each of these cases, the Court held that " 'a legislative decree of perpetual exclusion' from a chosen vocation" was "punishment" for purposes of the Bill of Attainder Clause. *Id.,* at 316. Those cases are inapposite here. Section 12(f) does not restrict in any way appellees' choice of vocations or otherwise restrict the exercise of any constitutional right. It merely pro-

Court's reasoning, except to the extent it relies upon the Secretary's regulation that "interprets" the 1983 Act. In view of the compelling interest of Government, the constitutionality of § 12(f) does not depend upon this interpretation.

In sum, I join Parts I, II–B, III, and IV of the Court's opinion, and its judgment.

JUSTICE BRENNAN, dissenting.

For the reasons stated in Part II of JUSTICE MARSHALL's dissenting opinion, I too would affirm the judgment of the District Court on the ground that § 12(f) of the Military Selective Service Act, as added by § 1113(a) of the Department of Defense Authorization Act of 1983, compels those students seeking financial aid who have not registered with the Selective Service in timely fashion to incriminate themselves and thereby violates the Fifth Amendment.

JUSTICE MARSHALL, dissenting.

In 1980, after a 5-year suspension, the United States Government reinstituted registration for military service. By Presidential Proclamation, all men born after January 1, 1960, were required to register with the Selective Service System within 30 days of their 18th birthday.[1] The issue in this case is not whether Congress has authority to implement the law, but whether the method it has chosen to do so offends constitutional guarantees of individual rights. I conclude that § 12(f) fails to pass constitutional muster on two grounds. First, it compels self-incrimination, in violation of

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vides that those men who wish to receive Title IV aid must first comply with the registration laws.

[1] Registration consists of completing SSS Form 1, available at any post office. The form requires the registrant to provide date of birth, sex, Social Security number, name, current and permanent mailing address, current telephone number, affirmation that the information provided is true, and date of that affirmation. A postal clerk date-stamps and initials the form, indicating whether the registrant produced identification. The registrant is under a continuing duty to notify Selective Service of changes in these data.

the Fifth Amendment. Second, it violates the right to equal protection of the laws guaranteed under the Due Process Clause of that Amendment.

## I

At the time of the enactment of the statute before the Court today, Congress understood that, of the draft-eligible population of 9,039,000 men, some 674,000 had failed to register, and many more registrants had failed to provide current mailing addresses.[2] Explanations for this widespread dereliction of legal duty have been as varied as the proposals to obtain full compliance. Testifying at oversight hearings, Government officials have told Congress that most nonregistrants are "uninformed of the requirement or are unaware of the importance of registration,"[3] while only "a relatively small number of nonregistrants have 'knowingly' neglected their duty."[4] Private organizations have testified that noncompliance with the Selective Service law "is grounded in registration's violation of individual conscience and its infringement of religious freedom";[5] that they oppose draft registration as a "massive government surveillance system" in which the Government collects, stores, and exchanges data on individuals in violation of constitutional and statutory rights;[6] and that many cannot register as a matter of conscience because current regulations prohibit them from adjudicating their conscientious objector status prior to induction.[7]

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[2] Oversight Hearing on Selective Service Prosecutions before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., 10 (1982) (hereinafter Oversight Hearing) (statement of Director of Selective Service, Maj. Gen. Thomas Turnage (Ret.)) (hereinafter Turnage); Attachment 17, *id.*, at 95–105 (Report of General Accounting Office). On the floor of the House the same day, Representative Solomon estimated 93% compliance and 700,000 nonregistrants. 128 Cong. Rec. 18355–18356 (1982).

[3] Oversight Hearing, at 11 (statement of Turnage); see also *id.*, at 7 (statement of Kenneth J. Coffey, Associate Director, (Military) Federal Personnel and Compensation Division, U. S. General Accounting Office).

[4] *Id.*, at 10 (statement of Turnage).

[5] *Id.*, at 47 (statement of Delton Franz for the National Interreligious Service Board for Conscientious Objectors). This group understands registration to be an integral part of conscription for war. Oversight Hearing, at 47–48. Cf. *Rostker* v. *Goldberg*, 453 U. S. 57, 68 (1981) ("Congress specifically linked its consideration of registration to induction, see, *e. g.*, S. Rep. No. 96–826, pp. 156, 160 (1980). Congressional judgments concerning registration and the draft are based on judgments concerning military operations and [combat] needs . . .").

Both the agency and Congress have crafted strategies to increase compliance with the law, such as increasing publicity programs, declaring a grace period when nonregistrants could comply without fear of prosecution, and posting lists of registrants in their local post offices.[8] To identify and locate nonregistrants, Selective Service has collected Social Security numbers on draft registration forms, and located nonregistrants through computer data bank sharing with the Department of Health and Human Services and through mail forwarding by the Internal Revenue Service.[9] Several persons have been prosecuted for their failure to register, and the names of others have been forwarded to the Department of Justice for investigation and possible prosecution; the attendant publicity is seen by the agency as an effective method of communicating the duty to register and the seriousness of the failure to do so.[10]

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[6] Oversight Hearing, at 35 (statement of David Landau, Legislative Counsel, American Civil Liberties Union, Washington, D. C.) (expressing concern that data collected for, *e. g.*, tax and Social Security purposes, upon a promise of confidentiality, are being used for enforcement purposes, by exemptions from the Privacy Act of 1974, which generally prohibits data-matching among Government agencies). See also n. 9, *infra*.

[7] Oversight Hearing, at 34–35 (statement of Landau) (contrasting regulations under prior draft, permitting application for conscientious objector status immediately after registration, and current regulations, presumptively classifying all registrants as available for induction, and permitting application for other status only within the 10-day period after receipt of a notice of induction). See 32 CFR §§ 1624.5(a), 1633.2(h), 1633.3 (1983). See also Oversight Hearing, at 42–43 (testimony of Rev. Barry Lynn, President, Draft Action).

[8] *Id.*, at 81–82 (statement of Turnage).

[9] After a class action successfully challenged agency practice as a violation of the Privacy Act of 1974, § 2, note following 5 U. S. C. § 552a (statutory authorization required to collect Social Security numbers), Congress amended the Military Selective Service Act to require registrants to provide Social Security numbers. Department of Defense Authorization Act of 1982, Pub. L. 97–86, § 916, 95 Stat. 1129, 50 U. S. C. App. § 453. See *Wolman* v. *United States*, 542 F. Supp. 84 (DC 1982). Pub. L. 97–86 also authorized the President to require the Secretary of Health and Human

It is in this context that Congress considered and adopted the statute before the Court, which was introduced on the floor by Representative Solomon and Senator Hayakawa as a rider to the Department of Defense Authorization Act of 1983. Section 1113(a) added a new subsection to the "Offenses and Penalties" section of the Military Selective Service Act. 50 U. S. C. App. § 462(f). The statute creates ineligibility for any form of assistance or benefit provided under Title IV of the Higher Education Act of 1965 (20 U. S. C. § 1070 *et seq.*) for any person required to register who fails to do so, 50 U. S. C. App. § 462(f)(1), and requires those persons to file with their postsecondary institution a "statement of compliance" with the draft registration requirement, 50 U. S. C. App. § 453. § 462(f)(2). As the Court holds today, the purpose of this statute was not to penalize nonregistrants, but to encourage compliance with the legal duty to provide information to the Selective Service System.

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Services to furnish the Director of Selective Service, for enforcement purposes, the name, date of birth, Social Security number, and address of any person required to register for the draft. 50 U. S. C. App. § 462(e).

The agency also has considered cooperation with nonfederal data systems, such as state drivers' licenses, and private data systems on a fee basis. Oversight Hearing, at 84.

[10] *Id.*, at 13–14 (statement of Lawrence Lippe, Criminal Division, Department of Justice) (159 persons, self-identified nonregistrants or reported by others, referred to United States Attorneys for possible prosecution; Department "keeping in close touch" with Selective Service as it begins active enforcement program through use of Social Security and other records). The Court has granted certiorari in *Wayte* v. *United States*, 467 U. S. 1214 (1984), to consider the First Amendment challenge to the Government's program of investigating and prosecuting persons identified through their vocal opposition to draft registration.

It is tempting to succumb to the comfortable conclusions the majority draws after its glancing review of this legislation. After all, the Government has an explicit constitutional duty to provide for the common defense. "[I]n a free society," as Congress has declared, "the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just . . . ." § 451(c). The statute at issue has something to do with promoting full compliance with the registration law, which in turn promotes fairness in allocating burdens in the event of reinstitution of involuntary induction. Much of the legislative rhetoric promoting § 12(f) seems unexceptional: youth should accept the obligations as well as the privileges of a democracy.[11] Nevertheless, mindful that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," *Boyd* v. *United States*, 116 U. S. 616, 634–635 (1886), I must dissent.

## II

I do not have to disagree with the majority that § 12(f) does not violate the constitutional prohibition against bills of attainder. That holding depends on construing the statute to permit late registration, *ante*, at 849–851, which in turn depends on construing Congress' intent as encouragement of compliance with the Selective Service registration requirement. *Ante*, at 854. The majority emphasizes the "nonpunitive spirit" of the legislation implicit in the fact that Congress "allowed *all* nonregistrants to qualify for Title IV aid simply by registering late." *Ante*, at 855. Congress did not, however, grant immunity from criminal prosecution for that act of late registration. Absent such a grant, § 12(f) must be struck because it compels self-incrimination.

The Fifth Amendment privilege against coerced self-incrimination extends to every means of government information gathering. *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973); *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 90 (1964) (WHITE, J., concurring); *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). In our regulatory state, the line between permissible conditioning of the Government's taxing and spending power and impermissible Government coercion of information that presents a real threat of self-incrimination is not easy to identify. But I am confident the line has been crossed here.[12]

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[11] See 128 Cong. Rec. 9665 (1982) (remarks of Sen. Hayakawa).

I do not take issue with the majority's conclusion, *ante*, at 856–857, that the Title IV application process itself does not require a student to divulge incriminating information to the educational institution.[13] The neutrality of this compliance verification system is central to the majority's acceptance of the permissible, regulatory purpose of the statute. However, our inquiry cannot stop there. Although § 12(f) does not coerce an admission of nonregistration, it does coerce registration with the Selective Service System, and hence individual reporting of self-incriminatory information directly to the Federal Government.

If appellees were to register with Selective Service now so that they could submit statements of compliance to obtain financial aid for their schooling, they would still be in violation of federal law, for, by registering late, they would not have submitted to registration "in accordance with any proclamation" issued under § 3 of the Military Selective Service Act,

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[12] Of course, there are other "rights of constitutional stature whose exercise [government] may not condition by the exaction of a price," *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (1967), such as the exercise of rights guaranteed by the First Amendment, but the posture of this appeal presents only a challenge to the burdens the legislation places on the exercise of Fifth Amendment rights.

[13] The compliance form does not require the student to state either the date of his birth or the date of his registration. The verification of registration, SSS Form 3A, required of all students after July 1, 1985, contains a "Date of Record," which would appear not to be the date of registration. 34 CFR §§ 668.26(b), (d)(1) (1983).

50 U. S. C. App. § 453. § 462(f)(1). Failure to comply with Selective Service registration requirements within 30 days of one's 18th birthday is a felony, punishable by imprisonment for up to five years and/or a fine of up to $10,000. 50 U. S. C. App. § 462(a).

A student who registers late provides the Government with two crucial links in the chain of evidence necessary to prosecute him criminally. Cf. *Marchetti* v. *United States*, 390 U. S. 39, 48, and n. 9 (1968). First, he supplies the Government with proof of two elements of a violation: his birth date and date of registration. Second, and perhaps more importantly, he calls attention to the fact that he is one of the 674,000 young men in technical violation of the Military Selective Service Act. Armed with these data, the Government need prove only that the student "knowingly" failed to register at the time prescribed by law in order to obtain a conviction. 50 U. S. C. App. § 462(a). When students, such as appellees in this case, have acknowledged their awareness of their legal duty to register, App. 11–12, 24–25, the Government could prosecute the commission of a felony.

There can be little doubt that a late registration creates a "real and appreciable" hazard of incrimination and prosecution, and that the risk is not "so improbable that no reasonable man would suffer it to influence his conduct." *Brown* v. *Walker*, 161 U. S. 591, 599–600 (1896). In their brief to this Court, for example, the appellants explicitly acknowledge that, although "failure to register within [30 days of one's 18th birthday] does not disqualify the registrant for Title IV aid, it is a criminal offense punishable under 50 U. S. C. App. (& Supp. V) 462." Brief for Appellants 17, n. 7. The Government thus appears to reserve the right to use information obtained by the leverage of withholding education aid as a basis for criminal prosecution. Communications with registering men convey the same message. For example, both the "Registration Form," SSS Form 1, and the "Acknowledgement Letter," SSS Form 3A, which is mailed to men as legal proof of compliance with Selective Service registration requirements, advise registrants that the information they have provided "may be furnished to the . . . Department of Justice—for review and processing of suspected violations of the Military Selective Service Act . . . [and to the] Federal Bureau of Investigation—for location of an individual when suspected of violation of the Military Selective Service Act." Finally, recent Government actions have acknowledged the realistic potential for prosecution. For example, President Reagan declared a "grace period" in the first months of 1982, in which men could register *without* penalty.[14] The obvious implication of this declaration is that once the grace period expires, late registrants will be prosecuted. All of these governmental actions confirm the serious risk of self-incrimination and prosecution inherent in the act of late registration.[15]

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[14] Registration Under the Military Selective Service Act, 18 Weekly Comp. of Pres. Doc. 8 (1982). The grace period extended from January 7 through February 28, 1982. N. Y. Times, Jan. 21, 1982, p. 14, col. 3. The Director of Selective Service, General Turnage, noted the correlation between extending immunity and encouraging registration compliance. Oversight Hearing, at 80–81 ("we have run clear off the chart"). See also *id.*, at 5–6 (400,000 registered as a result of 2-month grace period).

[15] Appellants' contention that the threat of incrimination is speculative and that therefore the Fifth Amendment is not implicated rests entirely on the assertion that under current (but concededly not "immutable") *policy*, prosecution for late registration is unlikely. Reply Brief for Appellants 15–16; Tr. of Oral Arg. 14. Just this Term, we acknowledged that "policy choices are made by one administration, and often reevaluated by another administration." *United States* v. *Mendoza*, 464 U. S. 154, 161 (1984). Considering that the statute of limitations for Selective Service registration violations is five years from the date of compliance with the law, or, for nonregistrants, age 31, 50 U. S. C. App. § 462(d), as well as the unpredictability and wide range of public and political responses to the act of noncooperation with military service over the course of our history, a nonregistrant reasonably expects immunity for his compelled disclosures, not merely references to current policy. The hard fact is that the penalty for late registration is precisely the same as the penalty for nonregistration: a possible prison term of five years and/or a possible fine of $10,000.

Having established that late registration is an incriminating act, the question to be asked is whether the Government has exercised its powers in a way that deprives appellees of the freedom to refrain from self-incrimination through late registration. *Garrity* v. *New Jersey*, 385 U. S. 493, 496 (1967); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). When the Government extracts incriminating information by the leverage of the threat of penalties, including the "threat of substantial economic sanction," *Lefkowitz* v. *Turley*, 414 U. S., at 82–83, the information is not volunteered. Thus, our cases have found coercion in statutes that extracted information through the threat of termination of state employment, *Garrity* v. *New Jersey*, *supra; Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation*, 392 U. S. 280 (1968); *Gardner* v. *Broderick*, 392 U. S. 273 (1968), through the threat of exclusion of a person from a profession, *Spevack* v. *Klein*, 385 U. S. 511 (1967), or through the threat of exclusion from participation in government contracts, *Lefkowitz* v. *Turley*, *supra*.

The threat of the denial of student aid is substantial economic coercion, and falls within the ambit of these cases. For students who had received federal education aid before enactment of § 12(f), termination of aid is coercive because it could force these students to curtail their studies, thereby forfeiting their investment in prior education and abandoning their hopes for obtaining a degree. Five of the six appellees in these cases fall into this category. App. 11–12, 24–25. Students who have not previously received federal aid may also be coerced by § 12(f). All students understand that entry into most professions and technical trades requires postsecondary education. For students who cannot otherwise afford this education, compliance with § 12(f) is coerced by the threat of foreclosing future employment opportunities. All of the appellees have stated that their own career plans require them to complete a college education. *Ibid.;* see also *id.*, at 16, 29.

By withholding federal aid and the opportunity to obtain postsecondary education, § 12(f) levies a substantial burden on students who have failed to register with the Selective Service System. This statutory provision coerces students into incriminating themselves by filing late registration forms. As the Court noted in *Garrity* v. *New Jersey*, *supra*, at 497, the "option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." I therefore completely agree with appellees that this enforcement mechanism violates the Fifth Amendment's proscription against self-incrimination as interpreted in our previous cases, and would strike the provision down on this ground alone.[16]

Moreover, I do not understand the Court today to dispute that § 12(f) raises serious Fifth Amendment problems. The Court concedes that it would be incriminating for appellees to register with the Selective Service now. *Ante*, at 857. The Court furthermore strongly suggests that appellees could exercise their Fifth Amendment rights if they did register, cf. *Garner* v. *United States*, 424 U. S. 648 (1976), and that the Government could not compel their answers at that point without immunization. *Ante*, at 858.[17] The majority incorrectly assumes, however, that appellees must claim their privilege against self-incrimination before they can raise a Fifth Amendment claim in this lawsuit. What the majority fails to recognize is that it would be just as incriminating for appellees to exercise their privilege against self-incrimination when they registered as it would be to fill out the form without exercising the privilege.[18] The barrier to prosecuting Military Selective Service Act violators is not so much the Government's inability to discover a birth date or date of registration as the difficulty in identifying the 674,000 nonregistrants. The late registrant who "takes the Fifth" on SSS Form 1 calls attention to himself as much as, if not more than, a late registrant who marks down his birth date and date of registration.

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[16] Of course, the general rule that a person must affirmatively assert the Fifth Amendment privilege or be deemed to have waived it, see, *e. g.*, *United States* v. *Kordel*, 397 U. S. 1, 7–10 (1970), is simply inapplicable in "the classic penalty situation [which excuses] the failure to assert the privilege." *Minnesota* v. *Murphy*, 465 U. S. 420, 435, and n. 7 (1984); see also *id.*, at 443–446 (MARSHALL, J., dissenting).

[17] Appellees would have two choices: complete the registration form, or note the Fifth Amendment privilege on the incomplete form. In either case, should appellees be prosecuted, they would argue that the card could not be introduced in evidence, and that the Government has the burden of proving that it made no use whatever of the incriminating disclosures. *Counselman* v. *Hitchcock*, 142 U. S. 547, 585–586 (1982). They might also argue that, having claimed the Fifth Amendment on their registration card, they can in good faith certify to the educational institution that they have complied with the Selective Service requirement, and receive Title

In *Marchetti* v. *United States*, 390 U. S. 39 (1968), and the related case of *Grosso* v. *United States*, 390 U. S. 62 (1968), the Court faced a similar situation, in which complying with a federal registration requirement was the practical equivalent of confessing to a crime. In those cases, federal law required persons engaged in the business of accepting wagers to register and pay an occupational and excise tax. Compliance did not exempt the gambler from any penalties for conducting his business, which was widely prohibited under federal and state law, and the information obtained if he did comply was readily available to assist the authorities in enforcing those penalties. Petitioners failed to file the re-

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IV aid. A statutory grant of immunity would far better promote Congress' aims.

[18] Of course, the Government can always draw an incriminating inference when a person claims a Fifth Amendment privilege. In the usual case, however, the Government has, for example, subpoenaed a witness to testify, and thus has already identified him. Whether he chooses not to appear, or appears but invokes the privilege, the Government knows of his refusal to cooperate. The appellees and other nonregistrants are not known to the Government. Therefore, invocation of the Fifth Amendment by appellees gives the Government a different quality of information.

quired forms because they feared that they would be prosecuted for gambling if they revealed their activities to the Federal Government; they were convicted of willful failure to do so. The Court reversed the convictions, holding invalid a "statutory system . . . utilized to pierce the anonymity of citizens engaged in criminal activity." *Grosso* v. *United States*, *supra*, at 76 (BRENNAN, J., concurring). The Court recognized that by filing an incomplete form, or explicitly invoking their Fifth Amendment privilege on the form itself, petitioners would incriminate themselves by informing the Government that they were involved in illegal gambling activities. The Court therefore ruled that petitioners could exercise their Fifth Amendment rights by making "a 'claim' by silence," *Garner* v. *United States*, *supra*, at 659, n. 11, and refraining from filing the required forms.

The *Marchetti-Grosso* Court based its holding in part on the fact that the information-gathering scheme was directed at those "inherently suspect of criminal activities." *Marchetti* v. *United States*, *supra*, at 47. Here, it is fair to say that the Government does not expect that most registrants will be in violation of the Selective Service laws. At first blush, the required information might therefore seem less like the *Marchetti-Grosso* inquiries and more like income tax returns, "neutral on their face and directed at the public at large." *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 79 (1965). In *Garner* v. *United States*, *supra*, at 661, the Court noted that the great majority of persons who file income tax returns do not incriminate themselves by disclosing the information required by the Government. Because the Government has no reason to anticipate incriminating responses when requiring citizens' self-reporting of answers to neutral regulatory inquiries, our cases put the burden of asserting a Fifth Amendment privilege on the speaker, and the right to make a claim by silence is not available.

To adopt this analogy, however, is to ignore the actual case or controversy before the Court. When Congress passed § 12(f), its focus was assuredly *not* prospective. As the majority explains, Congress forged the link between education aid and Selective Service registration in order to bring into compliance with the law the 674,000 existing nonregistrants, including the six appellees in these cases. *Ante*, at 849–850, and n. 4. Although as a general matter it is correct to say that registration is like an income tax return (neutral on its face and directed to the (male) population at large), § 12(f)-compelled *late* registration is directed to a group inherently suspect of criminal activity, squarely presenting a *Marchetti* issue.

In my view, therefore, young men who have failed to register with Selective Service, and at whom § 12(f) was substantially aimed, are entitled to the same "claim by silence" as Marchetti and Grosso. But these students are compelled to forgo that right under this statutory scheme. The defect in § 12(f) is that it denies students seeking federal aid the freedom to withhold their identities from the Federal Government. If appellees assert their Fifth Amendment privilege by their silence, they are penalized for exercising a constitutional right by the withholding of education aid. If they succumb to the economic coercion either by registering, or by registering but claiming the privilege as to particular disclosures, they have incriminated themselves.

Thus, I cannot accept the majority's view that appellees' Fifth Amendment claims are not ripe for review. If the Court is suggesting that appellees must wait until they are prosecuted for late registration before adjudication of their claim, that "is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so." *Albertson* v. *Subversive*

*Activities Control Board, supra,* at 76. As in *Albertson,* where a federal statute required members of the Communist Party to register, appellees are put to the choice of registering without a decision on the merits of their constitutional privilege claim, or not registering and suffering a penalty. A nonregistrant's most efficacious opportunity to exercise his privilege against self-incrimination without simultaneously compromising that privilege is to challenge § 12(f) anonymously, as appellees have done in this case.

In sum, appellees correctly state that this law coerces them into self-incrimination in the face of a substantial risk of prosecution. That risk should be cured by a statutory grant of immunity. See *Minnesota* v. *Murphy,* 465 U. S. 420, 429, and 435–436, n. 7 (1984) (opinion of the Court); *id.,* at 442 (MARSHALL, J., dissenting). The grant would confirm that Congress' intent in passing § 12(f) was not to punish nonregistrants, but to promote compliance with the registration requirement. The Government "may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." *Minnesota* v. *Murphy, supra,* at 436, n. 7, and cases cited therein. See also *Counselman* v. *Hitchcock,* 142 U. S., at 564–565, 585–586. The Government has a substantial interest in obtaining information to assure complete and accurate Selective Service registration, but obtaining it under the compulsion of § 12(f), which is "capable of forcing the self-incrimination which the Amendment forbids," *Lefkowitz* v. *Cunningham,* 431 U. S. 801, 806 (1977), is unconstitutional in the absence of immunity for the compelled disclosures. If Congress enacted § 12(f) to encourage compliance with registration requirements, and not to identify and punish late registrants, the constitutional legislative purpose would be fulfilled without implicating students' Fifth Amendment privilege against self-incrimination.

## III

The aspect of the law that compels self-incrimination is doubly troubling because a discrete subgroup of nonregistrants bears the brunt of the statute. The Federal Government has a duty under the Due Process Clause of the Fifth Amendment to guarantee to all its citizens the equal protection of the laws. *Rostker* v. *Goldberg*, 453 U. S. 57 (1981); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). Section 12(f), in my view, violates that constitutional duty.

The majority's superficial, indeed cavalier, rejection of appellees' equal protection argument, *ante*, at 858, n. 16, demonstrates once again a "callous indifference to the realities of life for the poor," *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 166 (1978) (MARSHALL, J., dissenting), and the inadequacy of the Court's analytical structure in this area of law. We should look to "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state [or federal] interests in support of the classification." *Dandridge* v. *Williams*, 397 U. S. 471, 521 (1970) (MARSHALL, J., dissenting). See also *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 98–99 (1973) (MARSHALL, J., dissenting). As a majority of the Court has noted, "the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred," and labels "may all too readily become facile abstractions used to justify a result." *Rostker* v. *Goldberg*, *supra*, at 70.

The majority is factually incorrect when it states that the statute at issue in this case treats all nonregistrants alike. "Only low-income and middle-income students will be caught in this trap," as was pointed out in floor debate on § 12(f). 128 Cong. Rec. 18356 (1982) (remarks of Rep. Moffett). Title IV education aid is awarded on the basis of need. See 20 U. S. C. § 1089 (need analysis) and accompanying regulations. Although federal education aid is significant for a large segment of postsecondary students, more than three out of four postsecondary students dependent on family incomes under $6,000 are receiving Title IV aid. U. S. Dept. of Education, Office of Student Financial Assistance, OSFA Program Book 18 (July 1981) (hereinafter OSFA Program Book).[19] In contrast, only 8% of students dependent on families with incomes over $30,000 receive any Department of Education-funded financial aid. *Ibid.* In the Basic Educational Opportunity Grant Program (now known as Pell Grants), 83.1% of the recipients are dependent on families with incomes of less than $12,000. *Id.*, at 27. In the State Student Incentive Program, 69.4% of the recipients are in this category. *Id.*, at 78 (figures for fiscal year 1977). It is therefore absurd to state that § 12(f) "treats all nonregistrants alike, denying aid to both the poor and the wealthy." *Ante*, at 859, n. 17. The wealthy do not require, are not applying for, and do not receive federal education assistance, and therefore are not subject to the requirement that they file statements that they have complied with the Selective Service registration requirement, nor to the economic compulsion to provide incriminating facts to the Government in the act of late registration.[20] Yet the obligation to comply with the law, and the failure to do so, know no economic distinction.

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[19] Although the OSFA Program Book is published annually, we cite to the 1981 edition because it contains the most recent statistics for distribution of federal education aid by income and ethnic group. Unless otherwise noted, the figures reported in the 1981 OSFA Program Book are for the 1978–1979 academic year.

[20] Students who are members of ethnic minority groups are especially reliant on federal assistance to obtain training beyond high school. 56.7% of Basic Educational Opportunity Grant recipients, 52.1% of Student Educational Opportunity Grant recipients, and 46.4% of Work Study grants recipients, are ethnic minorities, OSFA Program Book 27, 65, 74, although these students are still a small percentage of the postsecondary student

As appellees argued in the District Court and in their brief to this Court, by linking draft compliance with education aid, Congress has created a *de facto* classification based on wealth,[21] and has laid an unequal hand on those who have committed precisely the same offense of failing to register with the Selective Service within 30 days of their 18th birthday. Cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374 (1886). Further, § 12(f) clearly burdens these individuals' interest in access to education, which "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler* v. *Doe*, 457 U. S. 202, 221 (1982). Many of our cases have stressed the extraordinary nature of

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body. For example, only 14.3% of the college students in 1982 were minorities. U. S. Dept. of Commerce, Statistical Abstract of the United States 161, Table 258 (1984). Section 12(f) also penalizes only male students. In *Rostker* v. *Goldberg*, 453 U. S. 57 (1981), the Court held that gender differences influence combat roles and military needs and therefore justify male-only draft registration. While I disagreed with that conclusion, noting that the statute "thereby categorically excludes women from a fundamental civic obligation," *id.*, at 86, even had I joined the Court I would protest the extension of this gender classification into the area of federal education assistance, an area in which gender is irrelevant and any classification based on gender is constitutionally objectionable. Men and women are similarly situated for purposes of the allocation of education funds. That principle should not be undermined by co-opting education law to enforce criminal laws.

[21] The defects of the wealth classification are heightened because the classification is also based on youth. We would ignore our responsibility if we failed to give the statute before us most careful scrutiny. The young persons affected by this statute are in the very process of forging a means to establish their independence. Although enfranchised, they are less able to exercise their vote because of their transience and, frequently, state laws burdening student voter registration. See, *e. g.*, N. Y. Elec. Law § 5–104 (McKinney 1978). To my mind, they are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973) (opinion of the Court); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).

the individual's interest in education. See, *e. g.*, *Plyler* v. *Doe*, *supra*, at 234, 236 (BLACKMUN, J., concurring); *Vlandis* v. *Kline*, 412 U. S. 441, 459 (1973) (WHITE, J., concurring in judgment). I continue to believe that interest to be fundamental because of the relationship education bears to our most basic constitutional values. See, *e. g.*, *Martinez* v. *Bynum*, 461 U. S. 321, 346 (1983) (dissenting opinion); *Plyler* v. *Doe*, *supra*, at 230–231 (concurring opinion). I have written at length to explain my position, *San Antonio Independent School District* v. *Rodriguez*, 411 U. S., at 110–117, and need not repeat the analysis here.[22]

Declining to look at how § 12(f) actually works, the majority is satisfied not only that the statute does not disfavor any classification, but also that it "is rationally related to the legitimate Government objectives of encouraging registration and fairly allocating scarce federal resources." Ante, at 859, n. 17. But can Congress' admittedly important interest in enforcing the Military Selective Service Act justify unleashing a dual system for its enforcement? While all nonregistrants are subject to imprisonment and fine, only those nonregistrants who qualify for education aid based on need are subjected both to that criminal process and to the economic compulsion imposed by the loss of financial aid. Federal courts cannot overlook the fact that Congress' "understandable indignation" at nonregistrants, *ante*, at 856, n. 15, focused on a discrete subgroup.

If we accept that the purpose of § 12(f) is to promote compliance with Selective Service registration, then we must also consider the fit between the law and its object. The universe of nonregistrants at the time of this legislation was understood to be more than half a million men. The majority does not offer any support for its statement that "[t]hose who fail to register . . . are a significant part of the class to which Title IV assistance is otherwise offered." *Ante*, at 854, n. 13. See Tr. of Oral Arg. 11 (Government has no information on number of nonregistrants who are receiving financial aid).

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[22] Where our prior cases have focused particularly on the extraordinary importance to the individual of elementary and secondary education, our concern that burdening access to education creates permanent class distinctions and political disadvantage is equally relevant here. Postsecondary education is the necessary prerequisite to pursuit of countless vocations, both professional and technical. Deprivation of a livelihood is too great a price to pay for the assertion of the Fifth Amendment privilege. *Spevack* v. *Klein*, 385 U. S. 511 (1967).

We should reject the suggestion that the putative age-group overlap between the group required to register with Selective Service and the group pursuing postsecondary education is sufficient justification for this law. While it is true that the Equal Protection Clause does not require that legislatures resolve either all or none of a problem, *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110 (1949), it is also true that "nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Id.*, at 112–113 (Jackson, J., concurring). When the law lays an unequal hand on those who have committed precisely the same offense, the discrimination is invidious. Cf. *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541 (1942). Further, the adverse consequences of § 12(f) on an identifiable group are inevitable, creating a strong inference that the adverse consequences were desired. Cf. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279, n. 25 (1979).

The floor debate provides support for that inference. The House sponsor of § 12(f), Representative Solomon, acknowledged criticism that the amendment singled out the disadvantaged. "Now, maybe we are discriminating against the poor. And if we are, I guarantee I am going to come back with legislation on this floor tomorrow and the next day and the next day and every day of this session with amendments that will prohibit any funds from being used for the Job

Training Act if they are not registered, for any unemployment compensation insurance if they are not registered, and for any kind of taxpayers' money if they are not registered." 128 Cong. Rec. 18366 (1982).[23] "They" are the poor—a discrete subgroup of persons who receive financial benefits from their Government. This animus cannot be rationalized away by the argument that Congress has an important interest in the fair allocation of scarce resources. Entitlement programs of far greater scope than education aid—for example, farm price supports—confer benefits to a broader spectrum of economic interests, while much of our tax law—oil depletion allowances, accelerated depreciation, capital gains, property owners' deductions—favors the more advantaged. We can well imagine the effective political resistance that would follow Congress' conditioning rich persons' Government benefits and entitlements. I can think of no constitutionally valid purpose that would justify singling out the less advantaged for special law enforcement attention.

Congress has enacted other, constitutional means to enforce the Selective Service registration laws, means that do not involve invidious discrimination among subclasses of lawbreakers. The right to an education is too basic, and the governmental need to discriminate among nonregistrants is too tenuous for this Court to hide behind the screen of a rational relationship test to permit the misuse of nondiscriminatory education policy to meet the unrelated goals of military service.

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[23] See also Job Training Partnership Act, Pub. L. 97–300, § 504, 96 Stat. 1399, 29 U. S. C. § 1504. The Act is a "new job training program for the drop-out youth who are not prepared for employment, for welfare recipients who need training to escape from dependency, [and] for the economically disadvantaged who cannot compete in the labor market without help," as well as for dislocated workers. S. Rep. No. 97–469, p. 1 (1982). Title 29 U. S. C. § 1504 requires the Secretary of Labor to "insure that each individual participating in any program established under this Act . . . has not violated section 3 of the Military Selective Service Act" by not registering. See also Oversight Hearing, at 85 (remarks of Turnage) (positing linking compliance requirement with federal employment, unemployment compensation, Veterans' Administration dependency benefits, Social Security survivor's benefits, and Comprehensive Employment and Training Act programs).

## IV

As the District Court noted, the issue before us "turns not on whether the registration law should be enforced, but in what manner." *Doe* v. *Selective Service System*, 557 F. Supp. 937, 950 (1983). For the reasons stated above, I find § 12(f) of the Military Selective Service Act violative of the Fifth Amendment, both because it compels self-incrimination, and because it violates due process by denying persons the equal protection of the laws. I respectfully dissent.

# IRVING INDEPENDENT SCHOOL DISTRICT *v.* TATRO ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF TATRO, A MINOR

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83–558. Argued April 16, 1984—Decided July 5, 1984

Respondents' 8-year-old daughter was born with a defect known as spina bifida. As a result she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. To accomplish this, a procedure known as clean intermittent catheterization (CIC) was prescribed. This is a simple procedure that can be performed in a few minutes by a layperson with less than an hour's training. Since petitioner School District received federal funding under the Education of the Handicapped Act it was required to provide the child with "a free appropriate public education," which is defined in the Act to include "related services," which are defined in turn to include "supportive services (including . . . medical . . . services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education." Pursuant to the Act, petitioner developed an individualized education program for the child, but the program made no provision for school personnel to administer CIC. After unsuccessfully pursuing administrative remedies to secure CIC services for the child during school hours, respondents brought an action against petitioner and others in Federal District Court, seeking injunctive relief, damages, and attorney's fees. Respondents invoked the Education of the Handicapped Act, arguing that CIC is one of the included "related services" under the statutory definition, and also invoked § 504 of the Rehabilitation Act of 1973, which forbids a person, by reason of a handicap, to be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" any program receiving federal aid. After its initial denial of relief was reversed by the Court of Appeals, the District Court, on remand, held that CIC was a "related service" under the Education of the Handicapped Act, ordered that the child's education program be modified to include provision of CIC during school hours, and awarded compensatory damages against petitioner. The court further held that respondents had proved a violation of § 504 of the Rehabilitation Act, and awarded attorney's fees to respondents under § 505 of that Act. The Court of Appeals affirmed.

*Held:*

1. CIC is a "related service" under the Education of the Handicapped Act. Pp. 888–895.

(a) CIC services qualify as a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education," within the meaning of the Act. Without CIC services available during the school day, respondents' child cannot attend school and thereby "benefit from special education." Such services are no less related to the effort to educate than are services that enable a child to reach, enter, or exit a school. Pp. 890–891.

(b) The provision of CIC is not subject to exclusion as a "medical service." The Department of Education regulations, which are entitled to deference, define "related services" for handicapped children to include "school health services," which are defined in turn as "services provided by a qualified school nurse or other qualified person," and define "medical services" as "services provided by a licensed physician." This definition of "medical services" is a reasonable interpretation of congressional intent to exclude physician's services as such and to impose an obligation to provide school nursing services. Pp. 891–895.

2. Section 504 of the Rehabilitation Act is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services, *Smith* v. *Robinson*, *post*, p. 992, and therefore respondents are not entitled to any relief under § 504, including recovery of attorney's fees. Pp. 895–896.

703 F. 2d 823, affirmed in part and reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in all but Part III of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 896. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 896.

*James W. Deatherage* argued the cause for petitioner. With him on the briefs was *O. Glenn Weaver*.

*James C. Todd* argued the cause and filed a brief for respondents.*

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**Susan F. Heiligenthal* filed a brief for the Texas Association of School Boards Legal Assistance Fund as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Association for Persons with Severe Handicaps et al. by *Marilyn Holle;* for the New

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Education of the Handicapped Act or the Rehabilitation Act of 1973 requires a school district to provide a handicapped child with clean intermittent catheterization during school hours.

## I

Amber Tatro is an 8-year-old girl born with a defect known as spina bifida. As a result, she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. In accordance with accepted medical practice, clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, has been prescribed. The procedure is a simple one that may be performed in a few minutes by a layperson with less than an hour's training. Amber's parents, babysitter, and teenage brother are all qualified to administer CIC, and Amber soon will be able to perform this procedure herself.

In 1979 petitioner Irving Independent School District agreed to provide special education for Amber, who was then three and one-half years old. In consultation with her parents, who are respondents here, petitioner developed an individualized education program for Amber under the

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Jersey Department of the Public Advocate by *Joseph H. Rodriguez, Herbert D. Hinkle,* and *Michael L. Perlin;* for the New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System, by *Herbert Semmel* and *Minna J. Kotkin;* and for the Spina Bifida Association of America et al. by *Janet F. Stotland.*

Briefs of *amici curiae* were filed for the American Association of School Administrators by *Allen D. Schwartz;* and for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon.*

requirements of the Education of the Handicapped Act, 84 Stat. 175, as amended significantly by the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U. S. C. §§ 1401(19), 1414(a)(5). The individualized education program provided that Amber would attend early childhood development classes and receive special services such as physical and occupational therapy. That program, however, made no provision for school personnel to administer CIC.

Respondents unsuccessfully pursued administrative remedies to secure CIC services for Amber during school hours.[1] In October 1979 respondents brought the present action in District Court against petitioner, the State Board of Education, and others. See § 1415(e)(2). They sought an injunction ordering petitioner to provide Amber with CIC and sought damages and attorney's fees. First, respondents invoked the Education of the Handicapped Act. Because Texas received funding under that statute, petitioner was required to provide Amber with a "free appropriate public education," §§ 1412(1), 1414(a)(1)(C)(ii), which is defined to include "related services," § 1401(18). Respondents argued that CIC is one such "related service."[2] Second, respondents invoked § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794, which forbids an individual, by reason of a handicap, to be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" any program receiving federal aid.

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[1] The Education of the Handicapped Act's procedures for administrative hearings are set out in 20 U. S. C. § 1415. In this case a hearing officer ruled that the Education of the Handicapped Act did require the school to provide CIC, and the Texas Commissioner of Education adopted the hearing officer's decision. The State Board of Education reversed, holding that the Act did not require petitioner to provide CIC.

[2] As discussed more fully later, the Education of the Handicapped Act defines "related services" to include "supportive services (including . . . medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education." 20 U. S. C. § 1401(17).

The District Court denied respondents' request for a preliminary injunction. *Tatro* v. *Texas*, 481 F. Supp. 1224 (ND Tex. 1979). That court concluded that CIC was not a "related service" under the Education of the Handicapped Act because it did not serve a need arising from the effort to educate. It also held that § 504 of the Rehabilitation Act did not require "the setting up of governmental health care for people seeking to participate" in federally funded programs. *Id.*, at 1229.

The Court of Appeals reversed. *Tatro* v. *Texas*, 625 F. 2d 557 (CA5 1980) *(Tatro I)*. First, it held that CIC was a "related service" under the Education of the Handicapped Act, 20 U. S. C. § 1401(17), because without the procedure Amber could not attend classes and benefit from special education. Second, it held that petitioner's refusal to provide CIC effectively excluded her from a federally funded educational program in violation of § 504 of the Rehabilitation Act. The Court of Appeals remanded for the District Court to develop a factual record and apply these legal principles.

On remand petitioner stressed the Education of the Handicapped Act's explicit provision that "medical services" could qualify as "related services" only when they served the purpose of diagnosis or evaluation. See n. 2, *supra*. The District Court held that under Texas law a nurse or other qualified person may administer CIC without engaging in the unauthorized practice of medicine, provided that a doctor prescribes and supervises the procedure. The District Court then held that, because a doctor was not needed to administer CIC, provision of the procedure was not a "medical service" for purposes of the Education of the Handicapped Act. Finding CIC to be a "related service" under that Act, the District Court ordered petitioner and the State Board of Education to modify Amber's individualized education program to include provision of CIC during school hours. It also awarded compensatory damages against petitioner. *Tatro* v. *Texas*, 516 F. Supp. 968 (ND Tex. 1981).[3]

On the authority of *Tatro I*, the District Court then held that respondents had proved a violation of § 504 of the Rehabilitation Act. Although the District Court did not rely on this holding to authorize any greater injunctive or compensatory relief, it did invoke the holding to award attorney's fees against petitioner and the State Board of Education.[4] 516 F. Supp., at 968; App. to Pet. for Cert. 55a–63a. The Rehabilitation Act, unlike the Education of the Handicapped Act, authorizes prevailing parties to recover attorney's fees. See 29 U. S. C. § 794a.

The Court of Appeals affirmed. *Tatro* v. *Texas*, 703 F. 2d 823 (CA5 1983) *(Tatro II)*. That court accepted the District Court's conclusion that state law permitted qualified persons to administer CIC without the physical presence of a doctor, and it affirmed the award of relief under the Education of the Handicapped Act. In affirming the award of attorney's fees based on a finding of liability under the Rehabilitation Act, the Court of Appeals held that no change of circumstances since *Tatro I* justified a different result.

We granted certiorari, 464 U. S. 1007 (1983), and we affirm in part and reverse in part.

## II

This case poses two separate issues. The first is whether the Education of the Handicapped Act requires petitioner to provide CIC services to Amber. The second is whether § 504 of the Rehabilitation Act creates such an obligation. We first turn to the claim presented under the Education of the Handicapped Act.

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[3] The District Court dismissed the claims against all defendants other than petitioner and the State Board, though it retained the members of the State Board "in their official capacities for the purpose of injunctive relief." 516 F. Supp., at 972–974.

[4] The District Court held that § 505 of the Rehabilitation Act, 29 U. S. C. § 794a, which authorizes attorney's fees as a part of a prevailing party's costs, abrogated the State Board's immunity under the Eleventh Amendment. See App. to Pet. for Cert. 56a–60a. The State Board did not petition for certiorari, and the Eleventh Amendment issue is not before us.

States receiving funds under the Act are obliged to satisfy certain conditions. A primary condition is that the state implement a policy "that assures all handicapped children the right to a free appropriate public education." 20 U. S. C. § 1412(1). Each educational agency applying to a state for funding must provide assurances in turn that its program aims to provide "a free appropriate public education to all handicapped children." § 1414(a)(1)(C)(ii).

A "free appropriate public education" is explicitly defined as "special education and related services." § 1401(18).[5] The term "special education" means

> "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." § 1401(16).

"Related services" are defined as

> "transportation, and such developmental, corrective, and other *supportive services (including* speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling *services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from*

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[5] Specifically, the "special education and related services" must

"(A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) [be] provided in conformity with the individualized education program required under section 1414(a)(5) of this title." § 1401(18).

> *special education,* and includes the early identification and assessment of handicapping conditions in children." § 1401(17) (emphasis added).

The issue in this case is whether CIC is a "related service" that petitioner is obliged to provide to Amber. We must answer two questions: first, whether CIC is a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education"; and second, whether CIC is excluded from this definition as a "medical servic[e]" serving purposes other than diagnosis or evaluation.

## A

The Court of Appeals was clearly correct in holding that CIC is a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education."[6] It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services therefore fall squarely within the definition of a "supportive service."[7]

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[6] Petitioner claims that courts deciding cases arising under the Education of the Handicapped Act are limited to inquiring whether a school district has followed the requirements of the state plan and has followed the Act's procedural requirements. However, we held in *Board of Education of Hendrick Hudson Central School District* v. *Rowley*, 458 U. S. 176, 206, n. 27 (1982), that a court is required "not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an [individualized education plan] for the child in question which conforms with the requirements of § 1401(19) [defining such plans]." Judicial review is equally appropriate in this case, which presents the legal question of a school's substantive obligation under the "related services" requirement of § 1401(17).

[7] The Department of Education has agreed with this reasoning in an interpretive ruling that specifically found CIC to be a "related service." 46 Fed. Reg. 4912 (1981). Accord, *Tokarcik* v. *Forest Hills School District*, 665 F. 2d 443 (CA3 1981), cert. denied *sub nom. Scanlon* v. *Tokarcik*, 458 U. S. 1121 (1982). The Secretary twice postponed temporarily the effective date of this interpretive ruling, see 46 Fed. Reg. 12495 (1981); *id.*, at

As we have stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Board of Education of Hendrick Hudson Central School District* v. *Rowley*, 458 U. S. 176, 192 (1982). A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class, see 20 U. S. C. § 1401(17); and the Act specifically authorizes grants for schools to alter buildings and equipment to make them accessible to the handicapped, § 1406; see S. Rep. No. 94–168, p. 38 (1975); 121 Cong. Rec. 19483–19484 (1975) (remarks of Sen. Stafford). Services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.

We hold that CIC services in this case qualify as a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education."[8]

## B

We also agree with the Court of Appeals that provision of CIC is not a "medical servic[e]," which a school is required to provide only for purposes of diagnosis or evaluation. See 20 U. S. C. § 1401(17). We begin with the regulations of the

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18975, and later postponed it indefinitely, *id.*, at 25614. But the Department presently does view CIC services as an allowable cost under Part B of the Act. *Ibid.*

[8] The obligation to provide special education and related services is expressly phrased as a "conditio[n]" for a state to receive funds under the Act. See 20 U. S. C. § 1412; see also S. Rep. No. 94–168, p. 16 (1975). This refutes petitioner's contention that the Act did not "impos[e] an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys" but "spoke merely in precatory terms," *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 18 (1981).

Department of Education, which are entitled to deference.[9] See, *e. g.*, *Blum* v. *Bacon*, 457 U. S. 132, 141 (1982). The regulations define "related services" for handicapped children to include "school health services," 34 CFR § 300.13(a) (1983), which are defined in turn as "services provided by a qualified school nurse or other qualified person," § 300.13(b)(10). "Medical services" are defined as "services provided by a licensed physician." § 300.13(b)(4).[10] Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a "related service" are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

This definition of "medical services" is a reasonable interpretation of congressional intent. Although Congress devoted little discussion to the "medical services" exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence.[11] From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.

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[9] The Secretary of Education is empowered to issue such regulations as may be necessary to carry out the provisions of the Act. 20 U. S. C. § 1417(b). This function was initially vested in the Commissioner of Education of the Department of Health, Education, and Welfare, who promulgated the regulations in question. This function was transferred to the Secretary of Education when Congress created that position, see Department of Education Organization Act, §§ 301(a)(1), (2)(H), 93 Stat. 677, 20 U. S. C. §§ 3441(a)(1), (2)(H).

[10] The regulations actually define only those "medical services" that *are* owed to handicapped children: "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services." 34 CFR § 300.13(b)(4) (1983). Presumably this means that "medical services" *not* owed under the statute are those "services by a licensed physician" that serve other purposes.

[11] Children with serious medical needs are still entitled to an education. For example, the Act specifically includes instruction in hospitals and at home within the definition of "special education." See 20 U. S. C. § 1401(16).

Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel." S. Rep. No. 94–168, *supra*, at 33. School nurses have long been a part of the educational system, and the Secretary could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a "medical service." By limiting the "medical services" exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision.

Petitioner's contrary interpretation of the "medical services" exclusion is unconvincing. In petitioner's view, CIC is a "medical service," even though it may be provided by a nurse or trained layperson; that conclusion rests on its reading of Texas law that confines CIC to uses in accordance with a physician's prescription and under a physician's ultimate supervision. Aside from conflicting with the Secretary's reasonable interpretation of congressional intent, however, such a rule would be anomalous. Nurses in petitioner School District are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provision of CIC to the handicapped.[12] It would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped.

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[12] Petitioner attempts to distinguish the administration of prescription drugs from the administration of CIC on the ground that Texas law expressly limits the liability of school personnel performing the former, see Tex. Educ. Code Ann. § 21.914(c) (Supp. 1984), but not the latter. This distinction, however, bears no relation to whether CIC is a "related service." The introduction of handicapped children into a school creates numerous new possibilities for injury and liability. Many of these risks are

To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U. S. C. § 1401(1); 34 CFR § 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 CFR § 300.14, Comment (1) (1983).

Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.

Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. See 34 CFR §§ 300.13(a), (b)(4), (b)(10) (1983). It bears mentioning that here not even the services of a nurse are required; as is conceded, a layperson with minimal training is qualified to provide CIC. See also, *e. g., Department of Education of Hawaii* v. *Katherine D.*, 727 F. 2d 809 (CA9 1983).

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more serious than that posed by CIC, which the courts below found is a safe procedure even when performed by a 9-year-old girl. Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether petitioner decides to purchase more liability insurance or to persuade the State to extend the limitation on liability, the risks posed by CIC should not prove to be a large burden.

Finally, we note that respondents are not asking petitioner to provide *equipment* that Amber needs for CIC. Tr. of Oral Arg. 18–19. They seek only the *services* of a qualified person at the school.

We conclude that provision of CIC to Amber is not subject to exclusion as a "medical service," and we affirm the Court of Appeals' holding that CIC is a "related service" under the Education of the Handicapped Act.[13]

## III

Respondents sought relief not only under the Education of the Handicapped Act but under § 504 of the Rehabilitation Act as well. After finding petitioner liable to provide CIC under the former, the District Court proceeded to hold that petitioner was similarly liable under § 504 and that respondents were therefore entitled to attorney's fees under § 505 of the Rehabilitation Act, 29 U. S. C. § 794a. We hold today, in *Smith* v. *Robinson, post,* p. 992, that § 504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services. Respondents are therefore not entitled to relief under § 504, and we reverse the Court of Appeals' holding that respondents are entitled to recover attorney's fees. In all other respects, the judgment of the Court of Appeals is affirmed.

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[13] We need not address respondents' claim that CIC, in addition to being a "related service," is a "supplementary ai[d] and servic[e]" that petitioner must provide to enable Amber to attend classes with nonhandicapped students under the Act's "mainstreaming" directive. See 20 U. S. C. § 1412(5)(B). Respondents have not sought an order prohibiting petitioner from educating Amber with handicapped children alone. Indeed, any request for such an order might not present a live controversy. Amber's present individualized education program provides for regular public school classes with nonhandicapped children. And petitioner has admitted that it would be far more costly to pay for Amber's instruction and CIC services at a private school, or to arrange for home tutoring, than to provide CIC at the regular public school placement provided in her current individualized education program. Tr. of Oral Arg. 12.

*It is so ordered.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join all but Part III of the Court's opinion. For the reasons stated in my dissenting opinion in *Smith* v. *Robinson*, *post*, p. 992, I would affirm the award of attorney's fees to the respondents.

JUSTICE STEVENS, concurring in part and dissenting in part.

The petition for certiorari did not challenge the award of attorney's fees. It contested only the award of relief on the merits to respondents. Inasmuch as the judgment on the merits is supported by the Court's interpretation of the Education of the Handicapped Act, there is no need to express any opinion concerning the Rehabilitation Act of 1973.* Accordingly, while I join Parts I and II of the Court's opinion, I do not join Part III.

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*The "Statement of the Questions Presented" in the petition for certiorari reads as follows:

"1. Whether 'medical treatment' such as clean intermittent catheterization is a 'related service' required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor Respondent.

"2. Is a public school required to provide and perform the medical treatment prescribed by the physician of a handicapped child by the Education of All Handicapped Children Act or the Rehabilitation Act of 1973?

"3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in *Southeastern Community College* v. *Davis*, *Pennhurst State School & Hospital* v. *Halderman*, and *State Board of Education* v. *Rowley*." Pet. for Cert. i.

Because the Court does not hold that the Court of Appeals answered any of these questions incorrectly, it is not justified in reversing in part the judgment of that court.

# UNITED STATES *v.* LEON ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1771. Argued January 17, 1984—Decided July 5, 1984

Acting on the basis of information from a confidential informant, officers of the Burbank, Cal., Police Department initiated a drug-trafficking investigation involving surveillance of respondents' activities. Based on an affidavit summarizing the police officers' observations, Officer Rombach prepared an application for a warrant to search three residences and respondents' automobiles for an extensive list of items. The application was reviewed by several Deputy District Attorneys, and a facially valid search warrant was issued by a state-court judge. Ensuing searches produced large quantities of drugs and other evidence. Respondents were indicted for federal drug offenses, and filed motions to suppress the evidence seized pursuant to the warrant. After an evidentiary hearing, the District Court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause. Although recognizing that Officer Rombach had acted in good faith, the court rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good-faith reliance on a search warrant. The Court of Appeals affirmed, also refusing the Government's invitation to recognize a good-faith exception to the rule. The Government's petition for certiorari presented only the question whether a good-faith exception to the exclusionary rule should be recognized.

*Held:*

1. The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. Pp. 905–925.

(a) An examination of the Fourth Amendment's origin and purposes makes clear that the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong. The question whether the exclusionary sanction is appropriately imposed in a particular case as a judicially created remedy to safeguard Fourth Amendment rights through its deterrent effect, must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence. Indiscriminate application of the exclusionary rule—impeding the criminal justice system's truth-finding function and allowing some guilty defendants to go free—may well generate disrespect for the law and the administration of justice. Pp. 906–908.

(b) Application of the exclusionary rule should continue where a Fourth Amendment violation has been substantial and deliberate, but the balancing approach that has evolved in determining whether the rule should be applied in a variety of contexts—including criminal trials—suggests that the rule should be modified to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate. Pp. 908–913.

(c) The deference accorded to a magistrate's finding of probable cause for the issuance of a warrant does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based, and the courts must also insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police. Moreover, reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. However, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will not reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests. Pp. 913–917.

(d) Even assuming that the exclusionary rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law, and penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. Pp. 918–921.

(e) A police officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable. Suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the issuing magistrate wholly abandoned his detached and neutral judicial role. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i. e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. Pp. 922-925.

2. In view of the modification of the exclusionary rule, the Court of Appeals' judgment cannot stand in this case. Only respondent Leon contended that no reasonably well trained police officer could have believed that there existed probable cause to search his house. However, the record establishes that the police officers' reliance on the state-court judge's determination of probable cause was objectively reasonable. Pp. 925-926.

701 F. 2d 187, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 927. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 928. STEVENS, J., filed a dissenting opinion, *post*, p. 960.

*Solicitor General Lee* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, *Kathryn A. Oberly*, and *Robert J. Erickson*.

*Barry Tarlow* argued the cause for respondent Leon. With him on the brief were *Norman Kaplan* and *Thomas V. Johnston*. *Roger L. Cossack* argued the cause for respondents Stewart et al. With him on the brief was *Jay L. Lichtman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van De Kamp*, Attorney General, *William D. Stein*, Chief Assistant Attorney General, and *Clifford K. Thompson, Jr.*, Deputy Attorney General; for the State of Kansas et al. by *Wilkes C. Robinson*, *Dan M. Peterson*, *Robert T. Stephan*, Attorney General of Kansas, *John D. Ashcroft*, Attorney General of Missouri, *Mark V. Meierhenry*, Attorney General of South Dakota, and *Bronson C. La Follette*, Attorney General of Wisconsin; for the Criminal Justice Legal Foundation by *Christopher*

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. To resolve this question, we must consider once again the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are "ac-

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*N. Heard;* for the National District Attorneys Association, Inc., by *Newman A. Flanagan, Austin J. McGuigan, John M. Massameno, Edwin L. Miller, Jr., Jack E. Yelverton,* and *James P. Manak;* and for Seven Former Members of the Attorney General's Task Force on Violent Crime et al. by *David L. Crump, Frank G. Carrington, Griffin B. Bell, Wayne W. Schmidt, James P. Manak, Fred E. Inbau, Rufus L. Edmisten,* Attorney General of North Carolina, and *David S. Crump,* Deputy Attorney General.

Briefs of *amici curiae* urging affirmance were filed for the Bar Association of San Francisco et al. by *James J. Brosnahan;* for the Arkansas Trial Lawyers Association et al. by *John Wesley Hall, Jr.;* for the Association of Trial Lawyers of America by *Sidney Bernstein;* and for the Texas Criminal Defense Lawyers Association et al. by *Gerald H. Goldstein* and *Marvin Miller.*

Briefs of *amici curiae* were filed for the Committee on Criminal Law of the Association of the Bar of the City of New York by *Peter L. Zimroth* and *Barbara D. Underwood;* for the Illinois State Bar Association by *Michael J. Costello, Albert Hofeld, William J. Martin,* and *Joshua Sachs;* for the Minnesota State Bar Association by *Ronald L. Seeger, Steven H. Goldberg,* and *Bruce H. Hanley;* for the National Association of Criminal Defense Lawyers et al. by *Marshall W. Krause, Steffan B. Imhoff,* and *Charles Scott Spear;* for the National Association for the Advancement of Colored People et al. by *Steven P. Lockman, John M. Campbell,* and *Thomas I. Atkins;* for the National Legal Aid and Defender Association by *Kenneth M. Mogill;* and for Dan Johnston, County Attorney, Polk County, Iowa, by *Mr. Johnston, pro se.*

quitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U. S. 165, 175 (1969).

## I

In August 1981, a confidential informant of unproven reliability informed an officer of the Burbank Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone from their residence at 620 Price Drive in Burbank, Cal. The informant also indicated that he had witnessed a sale of methaqualone by "Patsy" at the residence approximately five months earlier and had observed at that time a shoebox containing a large amount of cash that belonged to "Patsy." He further declared that "Armando" and "Patsy" generally kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank.

On the basis of this information, the Burbank police initiated an extensive investigation focusing first on the Price Drive residence and later on two other residences as well. Cars parked at the Price Drive residence were determined to belong to respondents Armando Sanchez, who had previously been arrested for possession of marihuana, and Patsy Stewart, who had no criminal record. During the course of the investigation, officers observed an automobile belonging to respondent Ricardo Del Castillo, who had previously been arrested for possession of 50 pounds of marihuana, arrive at the Price Drive residence. The driver of that car entered the house, exited shortly thereafter carrying a small paper sack, and drove away. A check of Del Castillo's probation records led the officers to respondent Alberto Leon, whose telephone number Del Castillo had listed as his employer's. Leon had been arrested in 1980 on drug charges, and a companion had informed the police at that time that Leon was heavily involved in the importation of drugs into this country. Before the current investigation began, the Burbank officers had learned that an informant had told a Glendale police officer that Leon stored a large quantity of methaqualone at his residence in Glendale. During the course of this investigation, the Burbank officers learned that Leon was living at 716 South Sunset Canyon in Burbank.

Subsequently, the officers observed several persons, at least one of whom had prior drug involvement, arriving at the Price Drive residence and leaving with small packages; observed a variety of other material activity at the two residences as well as at a condominium at 7902 Via Magdalena; and witnessed a variety of relevant activity involving respondents' automobiles. The officers also observed respondents Sanchez and Stewart board separate flights for Miami. The pair later returned to Los Angeles together, consented to a search of their luggage that revealed only a small amount of marihuana, and left the airport. Based on these and other observations summarized in the affidavit, App. 34, Officer Cyril Rombach of the Burbank Police Department, an experienced and well-trained narcotics investigator, prepared an application for a warrant to search 620 Price Drive, 716 South Sunset Canyon, 7902 Via Magdalena, and automobiles registered to each of the respondents for an extensive list of items believed to be related to respondents' drug-trafficking activities. Officer Rombach's extensive application was reviewed by several Deputy District Attorneys.

A facially valid search warrant was issued in September 1981 by a State Superior Court Judge. The ensuing searches produced large quantities of drugs at the Via Magdalena and Sunset Canyon addresses and a small quantity at the Price Drive residence. Other evidence was discovered at each of the residences and in Stewart's and Del Castillo's automobiles. Respondents were indicted by a grand jury in the District Court for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of substantive counts.

The respondents then filed motions to suppress the evidence seized pursuant to the warrant.[1] The District Court held an evidentiary hearing and, while recognizing that the case was a close one, see *id.*, at 131, granted the motions to suppress in part. It concluded that the affidavit was insufficient to establish probable cause,[2] but did not suppress all of the evidence as to all of the respondents because none of the respondents had standing to challenge all of the searches.[3] In response to a request from the Government, the court made clear that Officer Rombach had acted in good faith, but it rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good-faith reliance on a search warrant.[4]

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[1] Respondent Leon moved to suppress the evidence found on his person at the time of his arrest and the evidence seized from his residence at 716 South Sunset Canyon. Respondent Stewart's motion covered the fruits of searches of her residence at 620 Price Drive and the condominium at 7902 Via Magdalena and statements she made during the search of her residence. Respondent Sanchez sought to suppress the evidence discovered during the search of his residence at 620 Price Drive and statements he made shortly thereafter. He also joined Stewart's motion to suppress evidence seized from the condominium. Respondent Del Castillo apparently sought to suppress all of the evidence seized in the searches. App. 78–80. The respondents also moved to suppress evidence seized in the searches of their automobiles.

[2] "I just cannot find this warrant sufficient for a showing of probable cause.

. . . . .

"There is no question of the reliability and credibility of the informant as not being established.

"Some details given tended to corroborate, maybe, the reliability of [the informant's] information about the previous transaction, but if it is not a stale transaction, it comes awfully close to it; and all the other material I think is as consistent with innocence as it is with guilt.

. . . . .

"So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant . . . ." *Id.*, at 127.

[3] The District Court concluded that Sanchez and Stewart had standing to challenge the search of 620 Price Drive; that Leon had standing to contest the legality of the search of 716 South Sunset Canyon; that none of the respondents had established a legitimate expectation of privacy in the condominium at 7902 Via Magdalena; and that Stewart and Del Castillo each had standing to challenge the searches of their automobiles. The

The District Court denied the Government's motion for reconsideration, *id.*, at 147, and a divided panel of the Court of Appeals for the Ninth Circuit affirmed, judgt. order reported at 701 F. 2d 187 (1983). The Court of Appeals first concluded that Officer Rombach's affidavit could not establish probable cause to search the Price Drive residence. To the extent that the affidavit set forth facts demonstrating the basis of the informant's knowledge of criminal activity, the information included was fatally stale. The affidavit, moreover, failed to establish the informant's credibility. Accordingly, the Court of Appeals concluded that the information provided by the informant was inadequate under both prongs of the two-part test established in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969).[5] The officers' independent investigation neither cured the staleness nor corroborated the details of the informant's declarations. The Court of Appeals then considered whether the affidavit formed a proper basis for the

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Government indicated that it did not intend to introduce evidence seized from the other respondents' vehicles. *Id.*, at 127–129. Finally, the court suppressed statements given by Sanchez and Stewart. *Id.*, at 129–130.

[4] "On the issue of good faith, obviously that is not the law of the Circuit, and I am not going to apply that law.

"I will say certainly in my view, there is not any question about good faith. [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true." *Id.*, at 140.

[5] In *Illinois* v. *Gates*, 462 U. S. 213 (1983), decided last Term, the Court abandoned the two-pronged *Aguilar-Spinelli* test for determining whether an informant's tip suffices to establish probable cause for the issuance of a warrant and substituted in its place a "totality of the circumstances" approach.

search of the Sunset Canyon residence. In its view, the affidavit included no facts indicating the basis for the informants' statements concerning respondent Leon's criminal activities and was devoid of information establishing the informants' reliability. Because these deficiencies had not been cured by the police investigation, the District Court properly suppressed the fruits of the search. The Court of Appeals refused the Government's invitation to recognize a good-faith exception to the Fourth Amendment exclusionary rule. App. to Pet. for Cert. 4a.

The Government's petition for certiorari expressly declined to seek review of the lower courts' determinations that the search warrant was unsupported by probable cause and presented only the question "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." We granted certiorari to consider the propriety of such a modification. 463 U. S. 1206 (1983). Although it undoubtedly is within our power to consider the question whether probable cause existed under the "totality of the circumstances" test announced last Term in *Illinois* v. *Gates*, 462 U. S. 213 (1983), that question has not been briefed or argued; and it is also within our authority, which we choose to exercise, to take the case as it comes to us, accepting the Court of Appeals' conclusion that probable cause was lacking under the prevailing legal standards. See this Court's Rule 21.1(a).

We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions. Accordingly, we reverse the judgment of the Court of Appeals.

## II

Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, *Mapp* v.

*Ohio*, 367 U. S. 643, 651, 655–657 (1961); *Olmstead* v. *United States*, 277 U. S. 438, 462–463 (1928), or that the rule is required by the conjunction of the Fourth and Fifth Amendments. *Mapp* v. *Ohio*, *supra*, at 661–662 (Black, J., concurring); *Agnello* v. *United States*, 269 U. S. 20, 33–34 (1925). These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time, see *Andresen* v. *Maryland*, 427 U. S. 463 (1976), and the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U. S. 465, 486 (1976).

### A

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." *United States* v. *Calandra*, 414 U. S. 338, 354 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, *ibid.*, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." *Stone* v. *Powell*, *supra*, at 540 (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, *supra*, at 348.

Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, *supra*, at 223. Only the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States* v. *Payner*, 447 U. S. 727, 734 (1980). An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.[6] Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. *Stone* v. *Powell*, 428 U. S., at 490. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." *Id.*, at 491. Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, at 348; see *Stone* v. *Powell*, *supra*, at 486–487; *United States* v. *Janis*, 428 U. S. 433, 447 (1976).

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[6] Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 A. B. F. Res. J. 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. Thus, the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. *Id.*, at 680. Davies' analysis of California data suggests that screening by police and prosecutors results in the release because of illegal searches or seizures of as many as 1.4% of all felony arrestees, *id.*, at 650, that 0.9% of felony arrestees are released, because of illegal searches or seizures, at the preliminary hearing or after trial, *id.*, at 653, and that roughly 0.05% of all felony arrestees benefit from reversals on appeal because of illegal searches. *Id.*, at 654. See also K. Brosi, A Cross-City Comparison of Felony Case Processing 16, 18–19 (1979); U. S. General Accounting Office, Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 10–11, 14 (1979); F. Feeney, F. Dill, & A. Weir, Arrests Without Convictions: How Often They Occur and Why 203–206 (National Institute of Justice

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Close attention to those remedial objectives has characterized our recent decisions concerning the scope of the Fourth Amendment exclusionary rule. The Court has, to be sure, not seriously questioned, "in the absence of a more efficacious sanction, the continued application of the rule to suppress ev-

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1983); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 1–2 (1982); Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A. B. F. Res. J. 585, 600. The exclusionary rule also has been found to affect the plea-bargaining process. S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence 63 (1977). But see Davies, *supra*, at 668–669; Nardulli, *supra*, at 604–606.

Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. "[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawlessness." *Illinois* v. *Gates*, 462 U. S., at 257–258 (WHITE, J., concurring in judgment). Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, see *infra*, at 916–921, we conclude that it cannot pay its way in those situations.

idence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate. . . ." *Franks* v. *Delaware*, 438 U. S. 154, 171 (1978); *Stone* v. *Powell*, *supra*, at 492. Nevertheless, the balancing approach that has evolved in various contexts—including criminal trials—"forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *Illinois* v. *Gates*, 462 U. S., at 255 (WHITE, J., concurring in judgment).

In *Stone* v. *Powell*, *supra*, the Court emphasized the costs of the exclusionary rule, expressed its view that limiting the circumstances under which Fourth Amendment claims could be raised in federal habeas corpus proceedings would not reduce the rule's deterrent effect, *id.*, at 489–495, and held that a state prisoner who has been afforded a full and fair opportunity to litigate a Fourth Amendment claim may not obtain federal habeas relief on the ground that unlawfully obtained evidence had been introduced at his trial. Cf. *Rose* v. *Mitchell*, 443 U. S. 545, 560–563 (1979). Proposed extensions of the exclusionary rule to proceedings other than the criminal trial itself have been evaluated and rejected under the same analytic approach. In *United States* v. *Calandra*, for example, we declined to allow grand jury witnesses to refuse to answer questions based on evidence obtained from an unlawful search or seizure since "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U. S., at 348. Similarly, in *United States* v. *Janis*, *supra*, we permitted the use in federal civil proceedings of evidence illegally seized by state officials since the likelihood of deterring police misconduct through such an extension of the exclusionary rule was insufficient to outweigh its substantial social costs. In so doing, we declared that, "[i]f . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted." *Id.*, at 454.

As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman* v. *United States*, 394 U. S., at 174. In determining whether persons aggrieved solely by the introduction of damaging evidence unlawfully obtained from their co-conspirators or codefendants could seek suppression, for example, we found that the additional benefits of such an extension of the exclusionary rule would not outweigh its costs. *Id.*, at 174–175. Standing to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct. *Rakas* v. *Illinois*, 439 U. S. 128 (1978); *Brown* v. *United States*, 411 U. S. 223 (1973); *Wong Sun* v. *United States*, 371 U. S. 471, 491–492 (1963). Cf. *United States* v. *Payner*, 447 U. S. 727 (1980).

Even defendants with standing to challenge the introduction in their criminal trials of unlawfully obtained evidence cannot prevent every conceivable use of such evidence. Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution's case in chief may be used to impeach a defendant's direct testimony. *Walder* v. *United States*, 347 U. S. 62 (1954). See also *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Harris* v. *New York*, 401 U. S. 222 (1971). A similar assessment of the "incremental furthering" of the ends of the exclusionary rule led us to conclude in *United States* v. *Havens*, 446 U. S. 620, 627 (1980), that evidence inadmissible in the prosecution's case in chief or otherwise as substantive evidence of guilt may be used to impeach statements made by a defendant in response to "proper cross-examination reasonably suggested by the defendant's direct examination." *Id.*, at 627–628.

When considering the use of evidence obtained in violation of the Fourth Amendment in the prosecution's case in chief, moreover, we have declined to adopt a *per se* or "but for" rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest. *Brown* v. *Illinois*, 422 U. S. 590 (1975); *Wong Sun* v. *United States*, *supra*, at 487–488. We also have held that a witness' testimony may be admitted even when his identity was discovered in an unconstitutional search. *United States* v. *Ceccolini*, 435 U. S. 268 (1978). The perception underlying these decisions—that the connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial—is a product of considerations relating to the exclusionary rule and the constitutional principles it is designed to protect. *Dunaway* v. *New York*, 442 U. S. 200, 217–218 (1979); *United States* v. *Ceccolini*, *supra*, at 279.[7] In short, the "dissipation of the taint" concept that the Court has applied in deciding whether exclusion is appropriate in a particular case "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown* v. *Illinois*, *supra*, at 609 (POWELL, J., concurring in part). Not surprisingly in view of this purpose, an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus. *Dunaway* v. *New York*, *supra*, at 218; *Brown* v. *Illinois*, *supra*, at 603–604.

The same attention to the purposes underlying the exclusionary rule also has characterized decisions not involving the scope of the rule itself. We have not required suppression of the fruits of a search incident to an arrest made in good-faith reliance on a substantive criminal statute that subsequently is declared unconstitutional. *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979).[8] Similarly, although the Court has been unwilling to conclude that new Fourth Amendment principles are always to have only prospective effect, *United States* v. *Johnson*, 457 U. S. 537, 560 (1982),[9] no Fourth Amendment decision marking a "clear break with the past" has been applied retroactively. See *United States* v. *Peltier*, 422 U. S. 531 (1975); *Desist* v. *United States*, 394 U. S. 244 (1969); *Linkletter* v. *Walker*, 381 U. S. 618 (1965).[10] The propriety of retroactive application of a newly announced Fourth Amendment principle, moreover, has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct. *United States* v. *Johnson*, *supra*, at 560–561; *United States* v. *Peltier*, *supra*, at 536–539, 542.

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[7] "*Brown*'s focus on 'the causal connection between the illegality and the confession' reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Dunaway* v. *New York*, 442 U. S., at 217–218 (citation omitted).

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[8] We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. See, *e. g.*, *Ybarra* v. *Illinois*, 444 U. S. 85 (1979); *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). "Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment." *Michigan* v. *DeFillippo*, 443 U. S., at 39. The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here.

[9] The Court held in *United States* v. *Johnson*, that a construction of the Fourth Amendment that did not constitute a "clear break with the past" is to be applied to all convictions not yet final when the decision was handed down. The limited holding, see 457 U. S., at 562, turned in part on the Court's judgment that "[f]ailure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.'" *Id.*, at 561 (emphasis in original) (quoting *Desist* v. *United States*, 394 U. S. 244, 277 (1969) (Fortas, J., dissenting)). Contrary to respondents' assertions, nothing in *Johnson* precludes adoption of a good-faith exception tailored to situations in which the police have reasonably relied on a warrant issued by a detached and neutral magistrate but later found to be defective.

[10] Our retroactivity decisions have, for the most part, turned on our assessments of "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). As we observed earlier this Term:

As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule.[11] But the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us. As we discuss below, our evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief.

## III

### A

Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard

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"In considering the reliance factor, this Court's cases have looked primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is at issue. Unjustified 'reliance' is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a 'clear break with the past.'" *Solem* v. *Stumes*, 465 U. S. 638, 645–646 (1984).

[11] Members of the Court have, however, urged reconsideration of the scope of the exclusionary rule. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465, 496 (1976) (BURGER, C. J., concurring); *id.*, at 536 (WHITE, J., dissenting); *Illinois* v. *Gates*, 462 U. S., at 254–267 (WHITE, J., concurring in judgment); *Brown* v. *Illinois*, 422 U. S. 590, 609–612 (1975) (POWELL, J., concurring in part); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 261–271 (1973) (POWELL, J., concurring); *California* v. *Minjares*, 443 U. S. 916 (1979) (REHNQUIST, J., dissenting from denial of stay). One Court of Appeals, no doubt influenced by these individual urgings, has adopted a form of good-faith exception to the exclusionary rule. *United States* v. *Williams*, 622 F. 2d 830 (CA5 1980) (en banc), cert. denied, 449 U. S. 1127 (1981).

against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977) (quoting *Johnson* v. *United States*, 333 U. S. 10, 14 (1948)), we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States* v. *Ventresca*, 380 U. S. 102, 106 (1965). See *Aguilar* v. *Texas*, 378 U. S., at 111. Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. *Spinelli* v. *United States*, 393 U. S., at 419. See *Illinois* v. *Gates*, 462 U. S., at 236; *United States* v. *Ventresca*, *supra*, at 108–109.

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks* v. *Delaware*, 438 U. S. 154 (1978).[12] Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar* v. *Texas*, *supra*, at 111. See *Illinois* v. *Gates*, *supra*, at 239. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326–327 (1979).

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[12] Indeed, "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." 438 U. S., at 165.

Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois* v. *Gates*, 462 U. S., at 239. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Ibid.* See *Aguilar* v. *Texas*, *supra*, at 114–115; *Giordenello* v. *United States*, 357 U. S. 480 (1958); *Nathanson* v. *United States*, 290 U. S. 41 (1933).[13] Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, *Illinois* v. *Gates*, *supra*, at 238–239, or because the form of the warrant was improper in some respect.

Only in the first of these three situations, however, has the Court set forth a rationale for suppressing evidence obtained pursuant to a search warrant; in the other areas, it has simply excluded such evidence without considering whether

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[13] See also *Beck* v. *Ohio*, 379 U. S. 89 (1964), in which the Court concluded that "the record . . . does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him." *Id.*, at 95. Although the Court was willing to assume that the arresting officers acted in good faith, it concluded:

> "'[G]ood faith on the part of the arresting officers is not enough.' *Henry* v. *United States*, 361 U. S. 98, 102. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Id.*, at 97.

We adhere to this view and emphasize that nothing in this opinion is intended to suggest a lowering of the probable-cause standard. On the contrary, we deal here only with the remedy to be applied to a concededly unconstitutional search.

Fourth Amendment interests will be advanced. To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.[14]

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.[15] Many of the factors

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[14] Although there are assertions that some magistrates become rubber stamps for the police and others may be unable effectively to screen police conduct, see, *e. g.*, 2 W. LaFave, Search and Seizure § 4.1 (1978); Kamisar, Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 569–571 (1983); Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L. J. 1361, 1412 (1981), we are not convinced that this is a problem of major proportions. See L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 119 (1967); Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L. Rev. 1319, 1414, n. 396 (1977); P. Johnson, New Approaches to Enforcing the Fourth Amendment 8–10 (Working Paper, Sept. 1978), quoted in Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 229–230 (5th ed. 1980); R. Van Duizend, L. Sutton, & C. Carter, The Search Warrant Process, ch. 7 (Review Draft, National Center for State Courts, 1983).

[15] As the Supreme Judicial Court of Massachusetts recognized in *Commonwealth* v. *Sheppard*, 387 Mass. 488, 506, 441 N. E. 2d 725, 735 (1982):

"The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. . . . [I]deally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a that indicate that the exclusionary rule cannot provide an effective "special" or "general" deterrent for individual offending law enforcement officers[16] apply as well to judges or magistrates. And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience,[17] it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.[18]

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search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates."

But see *United States* v. *Karathanos*, 531 F. 2d 26, 33–34 (CA2), cert. denied, 428 U. S. 910 (1976).

[16] See, *e. g., Stone* v. *Powell*, 428 U. S., at 498 (BURGER, C. J., concurring); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 709–710 (1970).

[17] See, *e. g., Dunaway* v. *New York*, 442 U. S. 220, 221 (1979) (STEVENS, J., concurring); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L. J. 365, 399–401 (1981).

[18] Limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications. We doubt that magistrates are more desirous of avoiding the exclusion of evidence obtained pursuant to warrants they have issued than of avoiding invasions of privacy.

Federal magistrates, moreover, are subject to the direct supervision of district courts. They may be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U. S. C. § 631(i). If a magistrate serves merely as a "rubber stamp" for the police or is

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If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping" and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.[19]

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ." *United States* v. *Janis*, 428 U. S., at 452, n. 22. But even assuming that the rule effectively

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unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule.

[19] Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. Cf. *Massachusetts* v. *Sheppard*, *post*, at 989, n. 6 ("[I]t was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested").

deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

As we observed in *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974), and reiterated in *United States* v. *Peltier*, 422 U. S., at 539:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.*, at 542:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

See also *Illinois* v. *Gates*, 462 U. S., at 260–261 (WHITE, J., concurring in judgment); *United States* v. *Janis*, *supra*, at 459; *Brown* v. *Illinois*, 422 U. S., at 610–611 (POWELL, J., concurring in part).[20] In short, where the officer's conduct is objectively reasonable,

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[20] We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains

> "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." *Stone* v. *Powell*, 428 U. S., at 539–540 (WHITE, J., dissenting).

This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.[21] In most

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the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Illinois* v. *Gates*, 462 U. S., at 261, n. 15 (WHITE, J., concurring in judgment); see *Dunaway* v. *New York*, 442 U. S., at 221 (STEVENS, J., concurring). The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *United States* v. *Peltier*, 422 U. S. 531, 542 (1975). As Professor Jerold Israel has observed:

> "The key to the [exclusionary] rule's effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits. [An objective good-faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to fourth amendment limitations. Finally, [it] should not encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality." Israel, *supra* n. 14, at 1412–1413 (footnotes omitted).

[21] According to the Attorney General's Task Force on Violent Crime, Final Report (1981), the situation in which an officer relies on a duly authorized warrant

> "is a particularly compelling example of good faith. A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions. Accordingly, we believe that

such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.*, at 498 (BURGER, C. J., concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.[22]

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there should be a rule which states that evidence obtained pursuant to and within the scope of a warrant is prima facie the result of good faith on the part of the officer seizing the evidence." *Id.*, at 55.

[22] To the extent that JUSTICE STEVENS' conclusions concerning the integrity of the courts, *post*, at 976–978, rest on a foundation other than his judgment, which we reject, concerning the effects of our decision on the deterrence of police illegality, we find his argument unpersuasive. "Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment." *United States* v. *Janis*, 428 U. S. 433, 458, n. 35 (1976). "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Stone* v. *Powell*, 428 U. S., at 485. Our cases establish that the question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts

"is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. . . . The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment." *United States* v. *Janis*, *supra*, at 459, n. 35.

Absent unusual circumstances, when a Fourth Amendment violation has occurred because the police have reasonably relied on a warrant issued by a detached and neutral magistrate but ultimately found to be defective, "the

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We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," *Illinois* v. *Gates*, 462 U. S., at 267 (WHITE, J., concurring in judgment), for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." *United States* v. *Ross*, 456 U. S. 798, 823, n. 32 (1982). Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–819 (1982),[23] and it is clear that in some circum-

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integrity of the courts is not implicated." *Illinois* v. *Gates*, *supra*, at 259, n. 14 (WHITE, J., concurring in judgment). See *Stone* v. *Powell*, 428 U. S., at 485, n. 23; *id.*, at 540 (WHITE, J., dissenting); *United States* v. *Peltier*, 422 U. S. 531, 536–539 (1975).

[23] In *Harlow*, we eliminated the subjective component of the qualified immunity public officials enjoy in suits seeking damages for alleged deprivations of constitutional rights. The situations are not perfectly analogous, but we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant. Although we have suggested that, "[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule," *Scott* v. *United States*, 436 U. S. 128, 139, n. 13 (1978), we believe that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts* v. *Painten*, 389 U. S. 560, 565 (1968) (WHITE, J., dissenting). Accordingly, our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances—

stances the officer[24] will have no reasonable grounds for believing that the warrant was properly issued.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks* v. *Delaware*, 438 U. S. 154 (1978). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois*, 422 U. S., at 610–611 (POWELL, J., concurring in part); see *Illinois* v. *Gates*, *supra*, at 263–264 (WHITE, J., concurring in judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i. e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts* v. *Sheppard*, *post*, at 988–991.

In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. Other objections to the modification of

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including whether the warrant application had previously been rejected by a different magistrate—may be considered.

[24] References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. See *Whiteley* v. *Warden*, 401 U. S. 560, 568 (1971).

the Fourth Amendment exclusionary rule we consider to be insubstantial. The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state.[25] There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate. As cases addressing questions of good-faith immunity under 42 U. S. C. § 1983, compare *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), with *Procunier* v. *Navarette*, 434 U. S. 555, 566, n. 14 (1978), and cases involving the harmless-error doctrine, compare *Milton* v. *Wainwright*, 407 U. S. 371, 372 (1972), with *Coleman* v. *Alabama*, 399 U. S. 1 (1970), make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases.

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[25] The argument that defendants will lose their incentive to litigate meritorious Fourth Amendment claims as a result of the good-faith exception we adopt today is unpersuasive. Although the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished.

If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.[26] Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith. We have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice.

## IV

When the principles we have enunciated today are applied to the facts of this case, it is apparent that the judgment of the Court of Appeals cannot stand. The Court of Appeals applied the prevailing legal standards to Officer Rombach's warrant application and concluded that the application could not support the magistrate's probable-cause determination. In so doing, the court clearly informed the magistrate that he had erred in issuing the challenged warrant. This aspect of the court's judgment is not under attack in this proceeding.

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[26] It has been suggested, in fact, that "the recognition of a 'penumbral zone,' within which an inadvertent mistake would not call for exclusion, . . . will make it less tempting for judges to bend fourth amendment standards to avoid releasing a possibly dangerous criminal because of a minor and unintentional miscalculation by the police." Schroeder, *supra* n. 14, at 1420–1421 (footnote omitted); see Ashdown, Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process, 24 Wm. & Mary L. Rev. 335, 383–384 (1983).

Having determined that the warrant should not have issued, the Court of Appeals understandably declined to adopt a modification of the Fourth Amendment exclusionary rule that this Court had not previously sanctioned. Although the modification finds strong support in our previous cases, the Court of Appeals' commendable self-restraint is not to be criticized. We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. Only respondent Leon has contended that no reasonably well trained police officer could have believed that there existed probable cause to search his house; significantly, the other respondents advance no comparable argument. Officer Rombach's application for a warrant clearly was supported by much more than a "bare bones" affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Accordingly, the judgment of the Court of Appeals is

*Reversed.*

JUSTICE BLACKMUN, concurring.

The Court today holds that evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law, from the case in chief of federal and state criminal prosecutions. In so doing, the Court writes another chapter in the volume of Fourth Amendment law opened by *Weeks* v. *United States*, 232 U. S. 383 (1914). I join the Court's opinion in this case and the one in *Massachusetts* v. *Sheppard*, *post*, p. 981, because I believe that the rule announced today advances the legitimate interests of the criminal justice system without sacrificing the individual rights protected by the Fourth Amendment. I write separately, however, to underscore what I regard as the unavoidably provisional nature of today's decisions.

As the Court's opinion in this case makes clear, the Court has narrowed the scope of the exclusionary rule because of an empirical judgment that the rule has little appreciable effect in cases where officers act in objectively reasonable reliance on search warrants. See *ante*, at 918–921. Because I share the view that the exclusionary rule is not a constitutionally compelled corollary of the Fourth Amendment itself, see *ante*, at 905–906, I see no way to avoid making an empirical judgment of this sort, and I am satisfied that the Court has made the correct one on the information before it. Like all courts, we face institutional limitations on our ability to gather information about "legislative facts," and the exclusionary rule itself has exacerbated the shortage of hard data concerning the behavior of police officers in the absence of such a rule. See *United States* v. *Janis*, 428 U. S. 433, 448–453 (1976). Nonetheless, we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.

What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

If a single principle may be drawn from this Court's exclusionary rule decisions, from *Weeks* through *Mapp* v. *Ohio*, 367 U. S. 643 (1961), to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom. It is incumbent on the Nation's law enforcement officers, who must continue to observe the Fourth Amendment in the wake of today's decisions, to recognize the double-edged nature of that principle.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.*

Ten years ago in *United States* v. *Calandra*, 414 U. S. 338 (1974), I expressed the fear that the Court's decision "may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search-and-seizure cases." *Id.*, at 365 (dissenting opinion). Since then, in case after case, I have witnessed the Court's gradual but determined strangulation

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*[This opinion applies also to No. 82-963, *Massachusetts* v. *Sheppard*, *post*, p. 981.]

of the rule.[1] It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the *pièce de résistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated—a result that had previously been thought to be foreclosed.

The Court seeks to justify this result on the ground that the "costs" of adhering to the exclusionary rule in cases like those before us exceed the "benefits." But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. When the Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.

The majority ignores the fundamental constitutional importance of what is at stake here. While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms. In the constitutional scheme they ordained, the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts. As James Madison predicted in his address to the First Congress on June 8, 1789:

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[1] See, *e. g., United States* v. *Peltier*, 422 U. S. 531, 544 (1975) (BRENNAN, J., dissenting); *United States* v. *Janis*, 428 U. S. 433, 460 (1976) (BRENNAN, J., dissenting); *Stone* v. *Powell*, 428 U. S. 465, 502 (1976) (BRENNAN, J., dissenting); *Michigan* v. *DeFillippo*, 443 U. S. 31, 41 (1979) (BRENNAN, J., dissenting); *United States* v. *Havens*, 446 U. S. 620, 629 (1980) (BRENNAN, J., dissenting).

> "If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439.

If those independent tribunals lose their resolve, however, as the Court has done today, and give way to the seductive call of expediency, the vital guarantees of the Fourth Amendment are reduced to nothing more than a "form of words." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920).

A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale. But even if I were to accept the Court's chosen method of analyzing the question posed by these cases, I would still conclude that the Court's decision cannot be justified.

## I

The Court holds that physical evidence seized by police officers reasonably relying upon a warrant issued by a detached and neutral magistrate is admissible in the prosecution's case in chief, even though a reviewing court has subsequently determined either that the warrant was defective, No. 82–963, or that those officers failed to demonstrate when applying for the warrant that there was probable cause to conduct the search, No. 82–1771. I have no doubt that these decisions will prove in time to have been a grave mistake. But, as troubling and important as today's new doctrine may be for the administration of criminal justice in this country, the mode of analysis used to generate that doctrine also requires critical examination, for it may prove in the long run to pose the greater threat to our civil liberties.

### A

At bottom, the Court's decision turns on the proposition that the exclusionary rule is merely a "'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right.'" *Ante*, at 906, quoting *United States* v. *Calandra*, 414 U. S., at 348. The germ of that idea is found in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), and although I had thought that such a narrow conception of the rule had been forever put to rest by our decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), it has been revived by the present Court and reaches full flower with today's decision. The essence of this view, as expressed initially in the *Calandra* opinion and as reiterated today, is that the sole "purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong . . . is *fully accomplished* by the original search without probable cause." 414 U. S., at 354 (emphasis added); see also *ante*, at 906. This reading of the Amendment implies that its proscriptions are directed solely at those government agents who may actually invade an individual's constitutionally protected privacy. The courts are not subject to any direct constitutional duty to exclude illegally obtained evidence, because the question of the admissibility of such evidence is not addressed by the Amendment. This view of the scope of the Amendment relegates the judiciary to the periphery. Because the only constitutionally cognizable injury has already been "fully accomplished" by the police by the time a case comes before the courts, the Constitution is not itself violated if the judge decides to admit the tainted evidence. Indeed, the most the judge *can* do is wring his hands and hope that perhaps by excluding such evidence he can deter future transgressions by the police.

Such a reading appears plausible, because, as critics of the exclusionary rule never tire of repeating,[2] the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. A short answer to this claim, of course, is that many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking in the context of concrete cases. The nature of our Constitution, as Chief Justice Marshall long ago explained, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819).

A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.

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[2] See, *e. g.*, Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 215 (1978); S. Schlesinger, Exclusionary Injustice (1977).

When that fact is kept in mind, the role of the courts and their possible involvement in the concerns of the Fourth Amendment comes into sharper focus. Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment.[3] Once that connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court's interpretation becomes more suspect. Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed.[4] It is difficult to give any meaning

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[3] In deciding to enforce the exclusionary rule as a matter of state law, the California Supreme Court clearly recognized this point:

"When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge." *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 912 (1955).

For a thoughtful examination of this point, see Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 289–307 (1974).

[4] Examination of the early state declarations of rights which formed the models for the Fourth Amendment reveals that they were aimed as much at explicitly limiting the manner in which government could gather evidence as at protecting individual privacy. For example, the Massachusetts Constitution of 1780 provided:

"Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and his possessions. All warrants, therefore, are contrary to this right, if the cause or foundaat all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements.[5] The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained.

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tion of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil Officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws." Art. XIV of the Declaration of Rights of 1780.

See generally T. Taylor, Two Studies in Constitutional Interpretation 41–43 (1969); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–105 (1970); J. Lanynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 30–48 (1966); Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1369 (1983).

[5] In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920), the Court expressly recognized this point in rejecting the Government's contention that it should be permitted to make use of knowledge obtained in violation of the Fourth Amendment:

"The Government now while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them . . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.*" *Id.*, at 391–392 (citations omitted) (emphasis added).

The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.

I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures.

Such a conception of the rights secured by the Fourth Amendment was unquestionably the original basis of what has come to be called the exclusionary rule when it was first formulated in *Weeks* v. *United States*, 232 U. S. 383 (1914). There the Court considered whether evidence seized in violation of the Fourth Amendment by a United States Marshal could be admitted at trial after the defendant had moved that the evidence be returned. Significantly, although the Court considered the Marshal's initial invasion of the defendant's home to be unlawful, it went on to consider a question that "involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence without his authority, by a United States Marshal holding no warrant for . . . the search of his premises." *Id.*, at 393. In answering that question, Justice Day, speaking for a unanimous Court, expressly recognized that the commands of the Fourth Amendment were addressed to both the courts and the Executive Branch:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and *the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.* The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Id.*, at 391–392.

The heart of the *Weeks* opinion, and for me the beginning of wisdom about the Fourth Amendment's proper meaning, is found in the following passage:

> "If letters and private documents can . . . be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great

> principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution. . . . Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.*, at 393–394.

What this passage succinctly captures is the essential recognition, ignored by the present Court, that seizures are generally executed for the purpose of bringing "proof to the aid of the Government," *id.*, at 393, that the utility of such evidence in a criminal prosecution arises ultimately in the context of the courts, and that the courts therefore cannot be absolved of responsibility for the means by which evidence is obtained. As the Court in *Weeks* clearly recognized, the obligations cast upon government by the Fourth Amendment are not confined merely to the police. In the words of Justice Holmes: "If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used." *Dodge* v. *United States*, 272 U. S. 530, 532 (1926). As the Court further explained in *Olmstead* v. *United States*, 277 U. S. 438 (1928):

> "The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a

> violation of the Amendment. Theretofore many had supposed under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. . . . But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to an action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received." *Id.*, at 462–463.

That conception of the rule, in my view, is more faithful to the meaning and purpose of the Fourth Amendment and to the judiciary's role as the guardian of the people's constitutional liberties. In contrast to the present Court's restrictive reading, the Court in *Weeks* recognized that, if the Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual's Fourth Amendment rights may be undermined as completely by one as by the other.

### B

From the foregoing, it is clear why the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases from *Weeks* to *Olmstead*.[6] In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by a direct constitutional command. A new phase in the history of the rule, however, opened with the Court's decision in *Wolf* v. *Colorado,* 338 U. S. 25 (1949). Although that decision held that the security of one's person and privacy protected by the Fourth Amendment was "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" of the Fourteenth Amendment, *id.*, at 27–28, quoting *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937), the Court went on, in what can only be regarded as a *tour de force* of constitutional obfuscation, to say that the "ways of enforcing such a basic right raise questions of a different order," 338 U. S., at 28. Notwithstanding the force of the *Weeks* doctrine that the Fourth Amendment required exclusion, a state court was free to admit illegally seized evidence, according to the Court in *Wolf,* so long as the State had devised some other "effective" means of vindicating a defendant's Fourth Amendment rights. 338 U. S., at 31.

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[6] See generally Kamisar, Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 598–599 (1983); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L. J. 365, 379–380 (1981).

Twelve years later, in *Mapp* v. *Ohio,* 367 U. S. 643 (1961), however, the Court restored the original understanding of the *Weeks* case by overruling the holding of *Wolf* and repudiating its rationale. Although in the course of reaching this conclusion the Court in *Mapp* responded at certain points to the question, first raised in *Wolf,* of whether the exclusionary rule was an "effective" remedy compared to alternative means of enforcing the right, see 367 U. S., at 651–653, it nevertheless expressly held that "all evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority,* inadmissible in a state court." *Id.*, at 655 (emphasis added). In the Court's view, the exclusionary rule was not one among a range of options to be selected at the discretion of judges; it was "an essential part of both the Fourth and Fourteenth Amendments." *Id.*, at 657. Rejection of the *Wolf* approach was constitutionally required, the Court explained, because "the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." 367 U. S., at 656. Indeed, no other explanation suffices to account for the Court's holding in *Mapp*, since the only possible predicate for the Court's conclusion that the States were bound by the Fourteenth Amendment to honor the *Weeks* doctrine is that the exclusionary rule was "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy." 367 U. S., at 651.[7]

Despite this clear pronouncement, however, the Court since *Calandra* has gradually pressed the deterrence rationale for the rule back to center stage. See, *e. g.*, *United States* v. *Peltier*, 422 U. S. 531 (1975); *United States* v. *Janis*, 428 U. S. 433 (1976); *Stone* v. *Powell*, 428 U. S. 465 (1976). The various arguments advanced by the Court in this campaign have only strengthened my conviction that the deterrence theory is both misguided and unworkable. First, the Court has frequently bewailed the "cost" of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the "price" our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free *not*, in Justice (then Judge) Cardozo's misleading epigram, "because the constable has blundered," *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926), but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost.[8]

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[7] Indeed, the Court in *Mapp* expressly noted that the "factual considerations" raised in *Wolf* concerning the effectiveness of alternative remedies "are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment." 367 U. S., at 651. It is true that in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), in holding that *Mapp* was not to be applied retroactively, the Court described the exclusionary rule as the "only effective deterrent to lawless police action," 381 U. S., at 636, thereby suggesting that the rule rested on a deterrence rationale. But, as I have explained on another occasion, "[t]he emphasis upon deterrence in *Linkletter* must be understood in the light of the crucial fact that the States had justifiably relied from 1949 to 1961 upon *Wolf*. . . , and consequently, that application of *Mapp* would have required the wholesale release of innumerable convicted prisoners, few of whom could have been successfully retried. In that circumstance, *Linkletter* held not only that retrospective application of *Mapp* would not further the goal of deterrence but also that it would not further 'the administration of justice and the integrity of the judicial process.' 381 U. S., at 637." *United States* v. *Calandra*, 414 U. S. 338, 359–360 (1974) (dissenting opinion).

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[8] Justice Stewart has explained this point in detail in a recent article:

"Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the Fourth Amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place. . . .

". . . The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. . . . [T]hat is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against

In addition, the Court's decisions over the past decade have made plain that the entire enterprise of attempting to assess the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly or accurately. Although the Court's language in those cases suggests that some specific empirical basis may support its analyses, the reality is that the Court's opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data. In *Calandra*, for example, the Court, in considering whether the exclusionary rule should apply in grand jury proceedings, had before it no concrete evidence whatever concerning the impact that application of the rule in such proceedings would have either in terms of the long-term costs or the expected benefits. To the extent empirical data are available regarding the general costs and benefits of the exclusionary rule, such data have shown, on the one hand, as the Court acknowledges today, that the costs are not as substantial as critics have asserted in the past, see *ante*, at 907–908, n. 6, and, on the other hand, that while the exclusionary rule may well have certain deterrent effects, it is extremely difficult to determine with any degree of precision whether the incidence of unlawful conduct by police is now lower than it was prior to *Mapp*. See *United States* v. *Janis*, 428 U. S., at 449–453, and n. 22; *Stone* v. *Powell*, 428 U. S., at 492, n. 32.[9] The

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unrestrained governmental power." Stewart, 83 Colum. L. Rev., at 1392–1393.

See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1563 (1972) ("Under the exclusionary rule a court attempts to maintain the status quo that would have prevailed if the constitutional requirement had been obeyed").

[9] See generally on this point, Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 A. B. F. Res. J. 611, 627–629; Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S. Tex. L. J. 559, 561–563 (1982); Critique, On the Limitations of Empirical Evaluations of

Court has sought to turn this uncertainty to its advantage by casting the burden of proof upon proponents of the rule, see, *e. g.*, *United States* v. *Janis*, *supra*, at 453–454. "Obviously," however, "the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion."[10]

By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics. The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties. I share the view, expressed by Justice Stewart for the Court in *Faretta* v. *California*, 422 U. S. 806 (1975), that "[p]ersonal liberties are not rooted in the law of averages." *Id.*, at 834. Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guesswork about deterrence, the Court should restore to its proper place the principle framed 70 years ago in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.

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the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 Nw. U. L. Rev. 740 (1974).

[10] Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L. J. 329, 332–333 (1973). See also White, Forgotten Points in the "Exclusionary Rule" Debate, 81 Mich. L. Rev. 1273, 1281–1282 (1983) (balancing of deterrent benefits and costs is an "inquiry [that] can never be performed in an adequate way and the reality is thus that the decision must rest not upon those grounds, but upon prior dispositions or unarticulated intuitions that are never justified"); Canon, *supra*, at 564; Kamisar, 16 Creighton L. Rev., at 646.

## II

Application of that principle clearly requires affirmance in the two cases decided today. In the first, *United States* v. *Leon*, No. 82–1771, it is conceded by the Government and accepted by the Court that the affidavit filed by the police officers in support of their application for a search warrant failed to provide a sufficient basis on which a neutral and detached magistrate could conclude that there was probable cause to issue the warrant. Specifically, it is conceded that the officers' application for a warrant was based in part on information supplied by a confidential informant of unproven reliability that was over five months old by the time it was relayed to the police. Although the police conducted an independent investigation on the basis of this tip, both the District Court and the Court of Appeals concluded that the additional information gathered by the officers failed to corroborate the details of the informant's tip and was "as consistent with innocence as . . . with guilt." App. to Pet. for Cert. 10a. The warrant, therefore, should never have issued. Stripped of the authority of the warrant, the conduct of these officers was plainly unconstitutional—it amounted to nothing less than a naked invasion of the privacy of respondents' homes without the requisite justification demanded by the Fourth Amendment. In order to restore the Government to the position it would have occupied had this unconstitutional search not occurred, therefore, it was necessary that the evidence be suppressed. As we said in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), the Warrant Clause is not "an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement." *Id.*, at 481 (footnote omitted).

A close examination of the facts of this case reveals that this is neither an extraordinary nor indeed a very costly step.

The warrant had authorized a search for cocaine, methaqualone tablets, and miscellaneous narcotics paraphernalia at several locations: a condominium at 7902 Via Magdalena in Los Angeles; a residence at 620 Price Drive in Burbank; a residence at 716 South Sunset Canyon in Burbank; and four automobiles owned respectively by respondents Leon, Sanchez, Stewart, and Del Castillo. App. 31–33. Pursuant to this warrant, the officers seized approximately four pounds of cocaine and over 1,000 methaqualone tablets from the Via Magdalena condominium, nearly one pound of cocaine from the Sunset Canyon residence, about an ounce of cocaine from the Price Drive residence, and certain paraphernalia from Del Castillo's and Stewart's automobiles. On the basis of this and other evidence, the four respondents were charged with violating 21 U. S. C. § 846 for conspiring to possess and distribute cocaine, and § 841(a)(1) for possessing methaqualone and cocaine with intent to distribute. The indictment specifically alleged that respondents had maintained the Via Magdalena condominum as a storage area for controlled substances which they distributed to prospective purchasers. App. 27–28.

At the suppression hearing, the District Court determined that none of the respondents had a sufficient expectation of privacy to contest the search of the Via Magdalena condominium, that respondents Stewart and Sanchez could challenge the search of their home at Price Drive, that respondent Leon was entitled to challenge the search of his home at Sunset Canyon, and that respondents Del Castillo and Stewart could contest the search of their cars. Given its finding that probable cause to issue the warrant was lacking, the District Court ruled that the evidence from the Price Drive residence could not be used against respondents Stewart and Sanchez, that evidence from the Sunset Canyon residence could not be used against Leon, and that evidence obtained from both Del Castillo's and Stewart's automobiles could not be used against them. App. to Pet. for Cert. 10a–13a.

The tenor of the Court's opinion suggests that this order somehow imposed a grave and presumably unjustifiable cost on society. Such a suggestion, however, is a gross exaggeration. Since the indictment focused upon a conspiracy among all respondents to use the Via Magdalena condominium as a storage area for controlled substances, and since the bulk of the evidence seized was from that condominium and was plainly admissible under the District Court's order, the Government would clearly still be able to present a strong case to the jury following the court's suppression order. I emphasize these details not to suggest how the Government's case would fare before the jury but rather to clarify a point that is lost in the Court's rhetorical excesses over the costs of the exclusionary rule—namely, that the suppression of evidence will certainly tend to weaken the Government's position but it will rarely force the Government to abandon a prosecution. Cf. *infra*, at 950–951, and n. 11. In my view, a doctrine that preserves intact the constitutional rights of the accused, and, at the same time, is sufficiently limited to permit society's legitimate and pressing interest in criminal law enforcement to be served should not be so recklessly discarded. It is a doctrine that gives life to the "very heart of the Fourth Amendment directive: that . . . a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises." *United States* v. *United States District Court*, 407 U. S. 297, 316 (1972).

In the second case before the Court, *Massachusetts* v. *Sheppard*, No. 82–963, the State concedes and the Court accepts that the warrant issued to search respondent's home completely failed to state with particularity the things to be seized. Indeed, the warrant expressly and particularly described things such as "controlled substance[s]" and "other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance" that the police had no reason whatsoever to believe were to be found in respondent's home. App. 17a. Given the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause . . . and particularly describing the . . . things to be seized," this warrant should never have been issued. The police who entered respondent's home, therefore, were without constitutional authority to do so.

Although the Court's opinion tends to overlook this fact, the requirement of particularity is not a mere "technicality," it is an express constitutional command. *Ybarra* v. *Illinois*, 444 U. S. 85, 92 (1979); *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319 (1979); *Stanford* v. *Texas*, 379 U. S. 476 (1965); *Marron* v. *United States*, 275 U. S. 192, 196 (1927). The purpose of that requirement is to prevent precisely the kind of governmental conduct that the faulty warrant at issue here created a grave risk of permitting—namely, a search that was not narrowly and particularly limited to the things that a neutral and detached magistrate had reason to believe might be found at respondent's home. Although it is true, as JUSTICE STEVENS observes, see *post*, at 964, that the affidavit submitted by the police set forth with particularity those items that they sought authority to search for, it is nevertheless clear that the warrant itself—the document which actually gave the officers legal authority to invade respondent's privacy—made no mention of these items. And, although it is true that the particular officers who applied for the warrant also happened to execute it and did so in accordance with the limits proposed in their affidavit, this happenstance should have no bearing on the central question whether these officers secured that prior judicial authority to conduct their search required by the Fourth Amendment. As we made clear in *United States* v. *United States District Court*, *supra*, at 317 (footnote omitted), "[t]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." See also *Katz* v. *United States*, 389 U. S. 347, 356–357 (1967) ("this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end"). Had the warrant actually been enforced by officers other than those who prepared the affidavit, the same result might not have occured; indeed, the wholly erroneous nature of the warrant might have led such officers to feel at liberty to roam throughout respondent's home in search of drugs. Cf. *Whiteley* v. *Warden*, 401 U. S. 560 (1971). I therefore fail to see how a search pursuant to such a fundamentally defective warrant can be characterized as "reasonable."

What the Framers of the Bill of Rights sought to accomplish through the express requirements of the Fourth Amendment was to define precisely the conditions under which government agents could search private property so that citizens would not have to depend solely upon the discretion and restraint of those agents for the protection of their privacy. Although the self-restraint and care exhibited by the officers in this case is commendable, that alone can never be a sufficient protection for constitutional liberties. I am convinced that it is not too much to ask that an attentive magistrate take those minimum steps necessary to ensure that every warrant he issues describes with particularity the things that his independent review of the warrant application convinces him are likely to be found in the premises. And I am equally convinced that it is not too much to ask that well-trained and experienced police officers take a moment to check that the warrant they have been issued at least describes those things for which they have sought leave to search. These convictions spring not from my own view of sound criminal law enforcement policy, but are instead compelled by the language of the Fourth Amendment and the history that led to its adoption.

## III

Even if I were to accept the Court's general approach to the exclusionary rule, I could not agree with today's result.

There is no question that in the hands of the present Court the deterrence rationale has proved to be a powerful tool for confining the scope of the rule. In *Calandra*, for example, the Court concluded that the "speculative and undoubtedly minimal advance in the deterrence of police misconduct," was insufficient to outweigh the "expense of substantially impeding the role of the grand jury." 414 U. S., at 351–352. In *Stone* v. *Powell*, the Court found that "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs." 428 U. S., at 493. In *United States* v. *Janis*, 428 U. S. 433 (1976), the Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." *Id.*, at 454. And in an opinion handed down today, the Court finds that the "balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the [Immigration and Naturalization Service]." *INS* v. *Lopez-Mendoza*, *post*, at 1050.

Thus, in this bit of judicial stagecraft, while the sets sometimes change, the actors always have the same lines. Given this well-rehearsed pattern, one might have predicted with some assurance how the present case would unfold. First there is the ritual incantation of the "substantial social costs" exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted. Upon analysis, however, such a result cannot be justified even on the Court's own terms.

At the outset, the Court suggests that society has been asked to pay a high price—in terms either of setting guilty persons free or of impeding the proper functioning of trials—as a result of excluding relevant physical evidence in cases where the police, in conducting searches and seizing evidence, have made only an "objectively reasonable" mistake concerning the constitutionality of their actions. See *ante*, at 907–908. But what evidence is there to support such a claim?

Significantly, the Court points to none, and, indeed, as the Court acknowledges, see *ante*, at 907–908, n. 6, recent studies have demonstrated that the "costs" of the exclusionary rule—calculated in terms of dropped prosecutions and lost convictions—are quite low. Contrary to the claims of the rule's critics that exclusion leads to "the release of countless guilty criminals," *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 416 (1971) (BURGER, C. J., dissenting), these studies have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and seizure problems. For example, a 1979 study prepared at the request of Congress by the General Accounting Office reported that only 0.4% of all cases actually declined for prosecution by federal prosecutors were declined primarily because of illegal search problems. Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979). If the GAO data are restated as a percentage of *all* arrests, the study shows that only 0.2% of all felony arrests are declined for prosecution because of potential exclusionary rule problems. See Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 A. B. F. Res. J. 611, 635.[11] Of course, these data describe only the costs attributable to the exclusion of evidence in all cases; the costs due to the exclusion of evidence in the narrower category of cases where police have made objectively reasonable mistakes must necessarily be even smaller. The Court, however, ignores this distinction and mistakenly weighs the aggregated costs of exclusion in *all* cases, irrespective of the circumstances that led to exclusion, see *ante*, at 907, against the potential benefits associated with only those cases in which evidence is excluded because police reasonably but mistakenly believe that their conduct does not violate the Fourth Amendment, see *ante*, at 915–921. When such faulty scales are used, it is little wonder that the balance tips in favor of restricting the application of the rule.

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[11] In a series of recent studies, researchers have attempted to quantify the actual costs of the rule. A recent National Institute of Justice study based on data for the 4-year period 1976–1979 gathered by the California Bureau of Criminal Statistics showed that 4.8% of all cases that were declined for prosecution by California prosecutors were rejected because of illegally seized evidence. National Institute of Justice, Criminal Justice Research Report—The Effects of the Exclusionary Rule: A Study in Cali-

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fornia 1 (1982). However, if these data are calculated as a percentage of all arrests, they show that only 0.8% of all arrests were rejected for prosecution because of illegally seized evidence. See Davies, 1983 A. B. F. Res. J., at 619.

In another measure of the rule's impact—the number of prosecutions that are dismissed or result in acquittals in cases where evidence has been excluded—the available data again show that the Court's past assessment of the rule's costs has generally been exaggerated. For example, a study based on data from nine midsized counties in Illinois, Michigan, and Pennsylvania reveals that motions to suppress physical evidence were filed in approximately 5% of the 7,500 cases studied, but that such motions were successful in only 0.7% of all these cases. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A. B. F. Res. J. 585, 596. The study also shows that only 0.6% of all cases resulted in acquittals because evidence had been excluded. *Id.*, at 600. In the GAO study, suppression motions were filed in 10.5% of all federal criminal cases surveyed, but of the motions filed, approximately 80–90% were denied. GAO Report, at 8, 10. Evidence was actually excluded in only 1.3% of the cases studied, and only 0.7% of all cases resulted in acquittals or dismissals after evidence was excluded. *Id.*, at 9–11. See Davies, *supra*, at 660. And in another study based on data from cases during 1978 and 1979 in San Diego and Jacksonville, it was shown that only 1% of all cases resulting in nonconviction were caused by illegal searches. F. Feeney, F. Dill, & A. Weir, Arrests Without Conviction: How Often They Occur and Why (National Institute of Justice 1983). See generally Davies, *supra*, at 663.

What then supports the Court's insistence that this evidence be admitted? Apparently, the Court's only answer is that even though the costs of exclusion are not very substantial, the potential deterrent effect in these circumstances is so marginal that exclusion cannot be justified. The key to the Court's conclusion in this respect is its belief that the prospective deterrent effect of the exclusionary rule operates only in those situations in which police officers, when deciding whether to go forward with some particular search, have reason to know that their planned conduct will violate the requirements of the Fourth Amendment. See *ante*, at 919–921. If these officers in fact understand (or reasonably should understand because the law is well settled) that their proposed conduct will offend the Fourth Amendment and that, consequently, any evidence they seize will be suppressed in court, they will refrain from conducting the planned search. In those circumstances, the incentive system created by the exclusionary rule will have the hoped-for deterrent effect. But in situations where police officers reasonably (but mistakenly) believe that their planned conduct satisfies Fourth Amendment requirements—presumably either (a) because they are acting on the basis of an apparently valid warrant, or (b) because their conduct is only later determined to be invalid as a result of a subsequent change in the law or the resolution of an unsettled question of law—then such officers will have no reason to refrain from conducting the search and the exclusionary rule will have no effect.

At first blush, there is some logic to this position. Undoubtedly, in the situation hypothesized by the Court, the existence of the exclusionary rule cannot be expected to have any deterrent effect on the particular officers at the moment they are deciding whether to go forward with the search. Indeed, the subsequent exclusion of any evidence seized under such circumstances appears somehow "unfair" to the particular officers involved. As the Court suggests, these officers have acted in what they thought was an appropriate and constitutionally authorized manner, but then the fruit of their efforts is nullified by the application of the exclusionary rule. *Ante*, at 920–921.

The flaw in the Court's argument, however, is that its logic captures only one comparatively minor element of the generally acknowledged deterrent purposes of the exclusionary rule. To be sure, the rule operates to some extent to deter future misconduct by individual officers who have had evidence suppressed in their own cases. But what the Court overlooks is that the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment. See *United States* v. *Peltier*, 422 U. S., at 556–557 (BRENNAN, J., dissenting). Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.[12] Thus, as the Court has previously recognized, "over the long term, [the] demonstration [provided by the exclusionary rule] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone* v. *Powell*, 428 U. S., at 492. It is only through such an institutionwide mechanism that information concerning Fourth Amendment standards can be effectively communicated to rank-and-file officers.[13]

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[12] As Justice Stewart has observed:

> "[T]he exclusionary rule is not designed to serve a specific deterrence function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a 'systematic deterrence': the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system—bringing criminals to justice—can be achieved only when evidence of guilt may be used against defendants." Stewart, 83 Colum. L. Rev., at 1400.

See also Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 709–710 (1970) ("The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them"); Mertens & Wasserstrom, 70 Geo. L. J., at 399–401; Kamisar, 16 Creighton L. Rev., at 597, n. 204.

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[13] Although specific empirical data on the systemic deterrent effect of the rule are not conclusive, the testimony of those actually involved in law enforcement suggests that, at the very least, the *Mapp* decision had the effect of increasing police awareness of Fourth Amendment requirements and of prompting prosecutors and police commanders to work towards educating rank-and-file officers. For example, as former New York Police Commissioner Murphy explained the impact of the *Mapp* decision: "I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect . . . . I was immediately caught up in the entire program of reevaluating our procedures, which had followed the *Defore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp*. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen." Murphy, Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments, 44 Texas L. Rev. 939, 941 (1966).

Further testimony about the impact of the *Mapp* decision can be found in the statement of Deputy Commissioner Reisman: "The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U. S. Constitution requires warrants in most cases, the U. S. Supreme Court had ruled that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother? Well, once that rule was changed we knew we had better start teaching our men about it." N. Y. Times, Apr. 28, 1965, p. 50, col. 1. A former United States Attorney and now Attorney General of Maryland, Stephen Sachs, has described the impact of the rule on police practices in similar terms: "I have watched the rule deter, routinely, throughout my years as a prosecutor. . . . [P]olice-prosecutor consultation is customary in all our cases when Fourth Amendment concerns arise. . . . In at least three Maryland

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

After today's decisions, however, that institutional incentive will be lost. Indeed, the Court's "reasonable mistake" exception to the exclusionary rule will tend to put a premium on police ignorance of the law. Armed with the assurance provided by today's decisions that evidence will always be admissible whenever an officer has "reasonably" relied upon a warrant, police departments will be encouraged to train officers that if a warrant has simply been signed, it is reasonable, without more, to rely on it. Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a "let's-wait-until-it's-decided" approach in situations in which there is a question about a warrant's validity or the basis for its issuance. Cf. *United States* v. *Johnson*, 457 U. S. 537, 561 (1982).[14]

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jurisdictions, for example, prosecutors are on twenty-four hour call to field search and seizure questions presented by police officers." Sachs, The Exclusionary Rule: A Prosecutor's Defense, 1 Crim. Justice Ethics 28, 30 (Summer/Fall 1982). See also LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U. Pitt. L. Rev. 307, 319 (1982); Mertens & Wasserstrom, *supra*, at 394–401.

[14] The authors of a recent study of the warrant process in seven cities concluded that application of a good-faith exception where an officer relies

Although the Court brushes these concerns aside, a host of grave consequences can be expected to result from its decision to carve this new exception out of the exclusionary rule. A chief consequence of today's decisions will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review. Creation of this new exception for good-faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence: If their decision to issue a warrant was correct, the evidence will be admitted; if their decision was incorrect but the police relied in good faith on the warrant, the evidence will also be admitted. Inevitably, the care and attention devoted to such an inconsequential chore will dwindle. Although the Court is correct to note that magistrates do not share the same stake in the outcome of a criminal case as the police, they nevertheless need to appreciate that their role is of some moment in order to continue performing the important task of carefully reviewing warrant applications. Today's decisions effectively remove that incentive.[15]

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upon a warrant "would further encourage police officers to seek out the less inquisitive magistrates and to rely on boilerplate formulae, thereby lessening the value of search warrants overall. Consequently, the benefits of adoption of a broad good faith exception in terms of a few additional prosecutions appears to be outweighed by the harm to the quality of the entire search warrant process and the criminal justice system in general." R. Van Duizend, L. Sutton, & C. Carter, The Search Warrant Process: Preconceptions, Perceptions, and Practices 8–12 (Review Draft, National Center for State Courts, 1983). See also Stewart, 83 Colum. L. Rev., at 1403.

[15] Just last Term in *Illinois* v. *Gates*, 462 U. S. 213 (1983), the Court noted:

"Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to

Moreover, the good-faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that if they can secure a warrant, so long as the circumstances of its issuance are not "entirely unreasonable," *ante*, at 923, all police conduct pursuant to that warrant will be protected from further judicial review.[16] The clear incentive that operated in the past to establish probable cause adequately because reviewing courts would examine the magistrate's judgment carefully, see, *e. g., Franks* v. *Delaware*, 438 U. S. 154, 169–170 (1978); *Jones* v. *United States*, 362 U. S. 257, 271–272 (1960); *Giordenello* v. *United States*, 357 U. S. 480, 483 (1958), has now been so completely vitiated that the police need only show that it was not "entirely unreasonable" under the cir-

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conscientiously review the sufficiency of affidavits on which warrants are issued." *Id.*, at 239.

After today's decisions, there will be little reason for reviewing courts to conduct such a conscientious review; rather, these courts will be more likely to focus simply on the question of police good faith. Despite the Court's confident prediction that such review will continue to be conducted, see *ante*, at 924–925, it is difficult to believe that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate's decision before considering the officer's good faith.

[16] As the Court of Appeals for the Second Circuit has observed in this regard:

"If a magistrate's issuance of a warrant were to be, as the government would have it, an all but conclusive determination of the validity of the search and of the admissibility of the evidence seized thereby, police officers might have a substantial incentive to submit their warrant applications to the least demanding magistrates, since once the warrant was issued, it would be exceedingly difficult later to exclude any evidence seized in the resulting search even if the warrant was issued without probable cause. . . . For practical purposes, therefore, the standard of probable cause might be diluted to that required by the least demanding official authorized to issue warrants, even if this fell well below what the Fourth Amendment required." *United States* v. *Karathanos*, 531 F. 2d 26, 34 (1976).

cumstances of a particular case for them to believe that the warrant they were issued was valid. See *ante*, at 923. The long-run effect unquestionably will be to undermine the integrity of the warrant process.

Finally, even if one were to believe, as the Court apparently does, that police are hobbled by inflexible and hypertechnical warrant procedures, today's decisions cannot be justified. This is because, given the relaxed standard for assessing probable cause established just last Term in *Illinois* v. *Gates*, 462 U. S. 213 (1983), the Court's newly fashioned good-faith exception, when applied in the warrant context, will rarely, if ever, offer any greater flexibility for police than the *Gates* standard already supplies. In *Gates*, the Court held that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*, at 238. The task of a reviewing court is confined to determining whether "the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Ibid.* Given such a relaxed standard, it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new *Gates* standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the test announced today.[17] Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mindboggling concept of objectively reasonable reliance upon an objectively unreasonable warrant.

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[17] See Kamisar, *Gates*, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L. Rev. 551, 588–589 (1984); Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257 (1984); LaFave, 43 U. Pitt. L. Rev., at 307.

This paradox, as JUSTICE STEVENS suggests, see *post,* at 961–962, perhaps explains the Court's unwillingness to remand No. 82–1771 for reconsideration in light of *Gates,* for it is quite likely that on remand the Court of Appeals would find no violation of the Fourth Amendment, thereby demonstrating that the supposed need for the good-faith exception in this context is more apparent than real. Therefore, although the Court's decisions are clearly limited to the situation in which police officers reasonably rely upon an apparently valid warrant in conducting a search, I am not at all confident that the exception unleashed today will remain so confined. Indeed, the full impact of the Court's regrettable decisions will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights.

## IV

When the public, as it quite properly has done in the past as well as in the present, demands that those in government increase their efforts to combat crime, it is all too easy for those government officials to seek expedient solutions. In contrast to such costly and difficult measures as building more prisons, improving law enforcement methods, or hiring more prosecutors and judges to relieve the overburdened court systems in the country's metropolitan areas, the relaxation of Fourth Amendment standards seems a tempting, costless means of meeting the public's demand for better law enforcement. In the long run, however, we as a society pay a heavy price for such expediency, because as Justice Jackson observed, the rights guaranteed in the Fourth Amendment "are not mere second-class rights but belong in the catalog of indispensable freedoms." *Brinegar* v. *United States*, 338 U. S. 160, 180 (1949) (dissenting opinion). Once lost, such rights are difficult to recover. There is hope, however, that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom.

I dissent.

JUSTICE STEVENS, concurring in the judgment in No. 82-963, *post*, p. 981, and dissenting in No. 82-1771.

It is appropriate to begin with the plain language of the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Court assumes that the searches in these cases violated the Fourth Amendment, yet refuses to apply the exclusionary rule because the Court concludes that it was "reasonable" for the police to conduct them. In my opinion an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time. The doctrinal vice in the Court's holding is its failure to consider the separate purposes of the two prohibitory Clauses in the Fourth Amendment.

The first Clause prohibits unreasonable searches and seizures and the second prohibits the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized. We have, of course, repeatedly held that warrantless searches are presumptively unreasonable,[1] and that there are only a few carefully delineated exceptions to that basic presumption.[2] But when such an exception has been recognized, analytically we have necessarily concluded that the warrantless activity was not "unreasonable" within the meaning of the first Clause. Thus, any Fourth Amendment case may present two separate questions: whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless "reasonable" within the meaning of the first. On these questions, the constitutional text requires that we speak with one voice. We cannot intelligibly assume, *arguendo*, that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable.

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[1] See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 586 (1980); *Chimel* v. *California*, 395 U. S. 752, 762–763 (1969).

## I

In No. 82–963, the Supreme Judicial Court of Massachusetts determined that a warrant which purported to authorize a search of respondent's home had been issued in violation of the Warrant Clause. In its haste to make new law, this Court does not tarry to consider this holding. Yet, as I will demonstrate, this holding is clearly wrong; I would reverse the judgment on that ground alone.

In No. 82–1771, there is also a substantial question whether the warrant complied with the Fourth Amendment. There was a strong dissent on the probable-cause issue when *Leon* was before the Court of Appeals, and that dissent has been given added force by this Court's intervening decision in *Illinois* v. *Gates*, 462 U. S. 213 (1983), which constituted a significant development in the law. It is probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates*. Adherence to our normal practice following the announcement of a new rule would therefore postpone, and probably obviate, the need for the promulgation of the broad new rule the Court announces today.[3]

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[2] See, *e. g., Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–475 (1971); *Vale* v. *Louisiana*, 399 U. S. 30 (1970).

It is, of course, disturbing that the Court chooses one case in which there was no violation of the Fourth Amendment, and another in which there is grave doubt on the question, in order to promulgate a "good faith" exception to the Fourth Amendment's exclusionary rule. The Court's explanation for its failure to decide the merits of the Fourth Amendment question in No. 82–963 is that it "is a factbound issue of little importance," *Massachusetts* v. *Sheppard*, *post*, at 988, n. 5. In No. 82–1771, the Court acknowledges that the case could be remanded to the Court of Appeals for reconsideration in light of *Gates*, yet does not bother to explain why it fails to do so except to note that it is "within our power" to decide the broader question in the case. *United States* v. *Leon*, *ante*, at 905. The Court seems determined to decide these cases on the broadest possible grounds; such determination is utterly at odds with the Court's traditional practice as well as any principled notion of judicial restraint. Decisions made in this manner are unlikely to withstand the test of time.

Judges, more than most, should understand the value of adherence to settled procedures. By adopting a set of fair procedures, and then adhering to them, courts of law ensure that justice is administered with an even hand. "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). Of course, this Court has a duty to face questions of constitutional law when necessary to the disposition of an actual case or controversy. *Marbury* v. *Madison*, 1 Cranch

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[3] In his petition for certiorari in *Leon*, the Solicitor General did not seek plenary review, but only that the petition "be disposed of as appropriate in light of the Court's decision in *Illinois* v. *Gates*," Pet. for Cert. in *United States* v. *Leon*, No. 82–1771, p. 10.

137, 177 (1803). But when the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role. I do not believe the Court should reach out to decide what is undoubtedly a profound question concerning the administration of criminal justice before assuring itself that this question is actually and of necessity presented by the concrete facts before the Court. Although it may appear that the Court's broad holding will serve the public interest in enforcing obedience to the rule of law, for my part, I remain firmly convinced that "the preservation of order in our communities will be best ensured by adherence to established and respected procedures." *Groppi* v. *Leslie*, 436 F. 2d 331, 336 (CA7 1971) (en banc) (Stevens, J., dissenting), rev'd, 404 U. S. 496 (1972).

## II

In No. 82–963, there is no contention that the police officers did not receive appropriate judicial authorization for their search of respondent's residence. A neutral and detached judicial officer had correctly determined that there was probable cause to conduct a search. Nevertheless, the Supreme Judicial Court suppressed the fruits of the search because the warrant did not particularly describe the place to be searched and the things to be seized.

The particularity requirement of the Fourth Amendment has a manifest purpose—to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search is carefully tailored to its justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit.[4] In this case the warrant did not come close to authorizing a general search.[5]

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[4] See *Andresen* v. *Maryland*, 427 U. S. 463, 480 (1976); *Stanley* v. *Georgia*, 394 U. S. 557, 569–572 (1969) (Stewart, J., concurring in result); *Stanford* v. *Texas*, 379 U. S. 476, 481–482, 485 (1965); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931); *Marron* v. *United States*, 275 U. S. 192, 195–196 (1927).

The affidavit supporting the application for the warrant correctly identified the things to be seized, and on its face the affidavit indicated that it had been presented to the judge who had issued the warrant.[6] Both the police officers and the judge were fully aware of the contents of the affidavit, and therefore knew precisely what the officers were authorized to search for. Since the affidavit was available for after-the-fact review, the Massachusetts courts could readily ascertain the limits of the officers' authority under the warrant. In short, the judge who issued the warrant, the police officers who executed it, and the reviewing courts all were able easily to ascertain the precise scope of the authorization provided by the warrant.

All that our cases require is that a warrant contain a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they are to search and what they are to seize.[7] The test is whether the executing officers' discretion has been limited in a way that forbids a general search.[8] Here there was no question that the executing officers' discretion had been limited—they, as well as the reviewing courts, knew the precise limits of their authorization. There was simply no "occasion or opportunity for officers to rummage at large," *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 566 (1978).[9]

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[5] Indeed, the "defect" in the warrant was that it authorized—albeit mistakenly—a search for quite particular "things to be seized," controlled substances, rather than the evidence described in the affidavit supporting the warrant application. This "defect" posed no risk of a general search. On its face, the warrant correctly identified the place to be searched. Thus, the threshold invasion of privacy—entry into respondent's home—was properly and specifically authorized. Moreover, the four corners of the warrant plainly indicate that it was not intended to authorize a search for controlled substances. On the cover of the warrant the caption "Controlled Substances" had been crossed out, and an "addendum" to the warrant authorized a search for and seizure of a rifle and ammunition, indicating that the warrant was not limited to controlled substances.

[6] The issuing judge attested to the affiant's signature on the affidavit.

[7] See *Steele* v. *United States*, 267 U. S. 498, 503 (1925).

[8] See *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 325 (1979); *Andresen* v. *Maryland*, 427 U. S., at 480–482; *Marcus* v. *Search Warrant*, 367 U. S. 717, 732–733 (1961).

The only Fourth Amendment interest that is arguably implicated by the "defect" in the warrant is the citizen's interest in being able to ascertain the limits of the officers' authorization by examining the warrant.[10] Respondent, however, was not home at the time the warrant was executed, and therefore had no occasion to see the warrant. The two persons who were present when the warrant was executed, respondent's mother and sister, did not read the warrant or ask to have it read. "[T]he general rule [is] that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman* v. *United States*, 394 U. S. 165, 174 (1969). Thus, respondent, who has standing to assert only his own Fourth Amendment interests,[11] cannot complain that his interest in ascertaining the limits of the officers' authority under the search warrant was infringed.[12] In short, our precedents construing the particularity requirement of the Warrant Clause unambiguously demonstrate that this warrant did not violate the Fourth Amendment.

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[9] See also *Coolidge* v. *New Hampshire*, 403 U. S., at 467.

[10] See *Illinois* v. *Gates*, 462 U. S. 213, 236 (1983); *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977); *Camara* v. *Municipal Court*, 387 U. S. 523, 532 (1967).

[11] See, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98, 104–106 (1980); *Rakas* v. *Illinois*, 439 U. S. 128 (1978).

[12] Even if respondent had standing to assert his right to be able to ascertain the officers' authority from the four corners of the warrant, it is doubtful that he could succeed. On its face the warrant authorized a search of respondent's residence, "42 Deckard Street." Had respondent read the warrant he would have had no reason to question the officers' right to enter the premises. Moreover, the face of the warrant indicated that the caption "Controlled Substances" had been stricken, and at the bottom of the warrant an addendum authorized the search for and seizure of a rifle and ammunition. The supporting affidavit, which the police had with them when they executed the warrant, and which was attested by the same judge who had issued the warrant, described in detail the items which the police were authorized to search for and to seize.

## III

Even if it be assumed that there was a technical violation of the particularity requirement in No. 82–963, it by no means follows that the "warrantless" search in that case was "unreasonable" within the meaning of the Fourth Amendment. For this search posed none of the dangers to which the Fourth Amendment is addressed. It was justified by a neutral magistrate's determination of probable cause and created no risk of a general search. It was eminently "reasonable."

In No. 82–1771, however, the Government now admits—at least for the tactical purpose of achieving what it regards as a greater benefit—that the substance, as well as the letter, of the Fourth Amendment was violated. The Court therefore assumes that the warrant in that case was not supported by probable cause, but refuses to suppress the evidence obtained thereby because it considers the police conduct to satisfy a "newfangled" nonconstitutional standard of reasonableness.[13] Yet if the Court's assumption is correct—if there was no probable cause—it must follow that it was "unreasonable"

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[13] I borrow the adjective from Justice Clark, who so characterized the warrants authorized by the Court in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), but not authorized by the Constitution itself. In an opinion joined by Justice Harlan and Justice Stewart, he wrote:

"Today the Court renders this municipal experience, which dates back to Colonial days, for naught by overruling *Frank* v. *Maryland* [359 U. S. 360 (1959)] and by striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people.

"But this is not all. It prostitutes the command of the Fourth Amendment that 'no Warrants shall issue, but upon probable cause' and sets up in the health and safety codes area inspection a newfangled 'warrant' system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and for the authorities to make unheralded entries into and searches of private dwellings and automobiles. The Court's conclusion that such searches undertaken without probable cause can nevertheless be "reasonable" is totally without support in our Fourth Amendment jurisprudence.

Just last Term, the Court explained what probable cause to issue a warrant means:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U. S., at 238.

Moreover, in evaluating the existence of probable cause, reviewing courts must give substantial deference to the magistrate's determination.[14] In doubtful cases the warrant

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creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop." *See* v. *City of Seattle*, 387 U. S. 541, 547 (1967) (dissenting in both *Camara* and *See*).

The kind of doctrinal difficulties in the two lines of cases engendered by the Court's creation of a newfangled warrant, compare *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), with *Donovan* v. *Dewey*, 452 U. S. 594 (1981), can be expected to grow out of the Court's creation of a new double standard of reasonableness today. Ironically, as I have previously suggested, the failure to consider both Clauses of the Amendment infects both lines of decision. See *Michigan* v. *Clifford*, 464 U. S. 287, 301–303 (1984) (STEVENS, J., concurring in judgment); *Dewey*, 452 U. S., at 606–608 (STEVENS, J., concurring); *Michigan* v. *Tyler*, 436 U. S. 499, 513 (1978) (STEVENS, J., concurring in part and concurring in judgment); *Barlow's*, 436 U. S., at 325–339 (STEVENS J., dissenting).

[14] See *Massachusetts* v. *Upton*, 466 U. S. 727, 732–733 (1984) *(per curiam)*; *Illinois* v. *Gates*, 462 U. S., at 236; *United States* v. *Harris*, 403 U. S. 573, 577–583 (1971) (plurality opinion); *Spinelli* v. *United States*, 393 U. S. 410, 419 (1969); *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964); *Jones* v. *United States*, 362 U. S. 257, 271 (1960).

should be sustained.[15] The judgment as to whether there is probable cause must be made in a practical and nontechnical manner.[16] The probable-cause standard therefore gives law enforcement officers ample room to engage in any reasonable law enforcement activity. What is more, the standard has been familiar to the law enforcement profession for centuries.[17] In an opinion written in 1949, and endorsed by the Court last Term in *Gates*, we explained:

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar* v. *United States*, 338 U. S. 160, 176.

Thus, if the majority's assumption is correct, that even after paying heavy deference to the magistrate's finding and resolving all doubt in its favor, there is no probable cause here, then by definition—as a matter of constitutional law—

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[15] See *Illinois* v. *Gates*, 462 U. S., at 237, n. 10; *United States* v. *Ventresca*, 380 U. S. 102, 109 (1965).

[16] See *Massachusetts* v. *Upton*, 466 U. S., at 732 *(per curiam)*; *Illinois* v. *Gates*, 462 U. S., at 231; *United States* v. *Ventresca*, 380 U. S., at 108.

[17] See, *e. g.*, 2 M. Hale, Pleas of the Crown 150 (1st Am. ed. 1847).

the officers' conduct was unreasonable.[18] The Court's own hypothesis is that there was no fair likelihood that the officers would find evidence of a crime, and hence there was no reasonable law enforcement justification for their conduct.[19]

The majority's contrary conclusion rests on the notion that it must be reasonable for a police officer to rely on a magistrate's finding. Until today that has plainly not been the law; it has been well settled that even when a magistrate issues a warrant there is no guarantee that the ensuing search and seizure is constitutionally reasonable. Law enforcement officers have long been on notice that despite the magistrate's decision a warrant will be invalidated if the officers did not provide sufficient facts to enable the magistrate to evaluate the existence of probable cause responsibly and independently.[20] Reviewing courts have always inquired into whether the magistrate acted properly in issuing the warrant—not merely whether the officers acted properly in executing it. See *Jones* v. *United States*, 362 U. S. 257, 271–272 (1960).[21] Indeed, just last Term, in *Gates*, after noting that "'the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for conclud[ing]' that probable cause existed,'" 462 U. S., at 238–239 (quoting *Jones*, 362 U. S., at 271), the Court added:

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[18] "[I]f nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable-cause requirement is not satisfied. In the absence of some other showing of reasonableness, the ensuing search violates the Fourth Amendment." *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 583 (1978) (STEVENS, J., dissenting).

[19] As the majority recognizes, *United States* v. *Leon*, *ante*, at 915, n. 13, an officer's good faith cannot make otherwise "unreasonable" conduct reasonable. See *Terry* v. *Ohio*, 392 U. S. 1, 22 (1968); *Beck* v. *Ohio*, 379 U. S. 89, 97 (1964); *Henry* v. *United States*, 361 U. S. 98, 102 (1959). The majority's failure to appreciate the significance of that recognition is inexplicable.

[20] See *Franks* v. *Delaware*, 438 U. S. 154, 165, 169–170 (1978); *Whiteley* v. *Warden*, 401 U. S. 560, 564 (1971); *Spinelli* v. *United States*, 393 U. S., at 415–416; *United States* v. *Ventresca*, 380 U. S., at 108–109; *Aguilar* v. *Texas*, 378 U. S., at 113–115; *Nathanson* v. *United States*, 290 U. S. 41 (1933); *Byars* v. *United States*, 273 U. S. 28 (1927).

[21] In making this point in *Franks* v. *Delaware*, 438 U. S. 154 (1978), JUSTICE BLACKMUN wrote for the Court: "We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which

> "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." 462 U. S. at 239.[22]

Thus, under our cases it has never been "reasonable" for the police to rely on the mere fact that a warrant has issued; the police have always known that if they fail to supply the magistrate with sufficient information, the warrant will be held invalid and its fruits excluded.[23]

The notion that a police officer's reliance on a magistrate's warrant is automatically appropriate is one the Framers of

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is also subject to a post-search examination, and the question of its integrity." *Id.*, at 171. Yet today the Court justifies its holding in part by distinguishing veracity claims, *United States* v. *Leon*, *ante*, at 922–923, thereby distinguishing what we previously held could not be distinguished on a principled basis. Just why it should be less reasonable for an innocent officer to rely on a warrant obtained by another officer's fraud than for him to rely on a warrant that is not supported by probable cause is entirely unclear to me.

[22] Judicial review of magisterial determinations is all the more necessary since the magistrate acts without benefit of adversarial presentation; his determination partakes of the unreliability inherent in any *ex parte* proceeding. See *Franks* v. *Delaware*, 438 U. S., at 169.

[23] The majority seems to be captivated by a vision of courts invalidating perfectly reasonable police conduct because of "technical" violations of the Fourth Amendment. In my view there is no such thing as a "technical" violation of the Fourth Amendment. No search or seizure can be unconstitutional unless it is "unreasonable." By definition a Fourth Amendment violation cannot be reasonable. My analysis of No. 82–963 illustrates this point.

the Fourth Amendment would have vehemently rejected. The precise problem that the Amendment was intended to address was *the unreasonable issuance of warrants.* As we have often observed, the Amendment was actually motivated by the practice of issuing general warrants—warrants which did not satisfy the particularity and probable-cause requirements.[24] The resentments which led to the Amendment were directed at the issuance of *warrants* unjustified by particularized evidence of wrongdoing.[25] Those who sought to amend the Constitution to include a Bill of Rights repeatedly voiced the view that the evil which had to be addressed was the issuance of warrants on insufficient evidence.[26] As Professor Taylor has written:

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[24] See, *e. g., Steagald* v. *United States*, 451 U. S. 204, 220 (1981); *Payton* v. *New York*, 445 U. S., at 583–584; *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S., at 325; *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 327–328 (STEVENS, J., dissenting); *United States* v. *Chadwick*, 433 U. S., at 7–8; *Chimel* v. *California*, 395 U. S., at 760–762; *Stanford* v. *Texas*, 379 U. S., at 480–485; *Marcus* v. *Search Warrant*, 367 U. S., at 727–729; *Henry* v. *United States*, 361 U. S., at 100–101; *Frank* v. *Maryland*, 359 U. S. 360, 363–365 (1959); *United States* v. *Rabinowitz*, 339 U. S. 56, 69–70 (1950) (Frankfurter, J., dissenting); *Marron* v. *United States*, 275 U. S., at 195–196; *Weeks* v. *United States*, 232 U. S. 383, 390–391 (1914); *Boyd* v. *United States*, 116 U. S. 616, 624–630 (1886).

[25] See J. Landynski, Search and Seizure and the Supreme Court 19–47 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 53–98 (1937); R. Rutland, The Birth of the Bill of Rights 11 (rev. ed. 1983); Marke, The Writs of Assistance Case and the Fourth Amendment, in Essays in Legal History in Honor of Felix Frankfurter 351 (M. Forkosch ed. 1966).

[26] See 1 The Bill of Rights: A Documentary History 473, 488–489, 508 (B. Schwartz ed. 1971); 2 *id.*, at 658, 665, 730, 733–734, 805–806, 815, 841–842, 913, 968. In fact, the original version of the Fourth Amendment contained only one clause providing that the right to be protected against unreasonable searches and seizures "shall not be violated by warrants issuing . . . ." The change to its present form broadened the coverage of the Amendment but did not qualify the unequivocal prohibition against the issuance of warrants without probable cause. See 2 *id.*, at 1112; N. Lasson, *supra* n. 25, at 101–103.

> "[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . . ." T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not based on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia.[27]

## IV

In *Brinegar*, Justice Jackson, after observing that "[i]ndications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position," 338 U. S., at 180 (dissenting opinion), continued:

> "These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and

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[27] "It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper." *United States* v. *Rabinowitz*, 339 U. S., at 69 (Frankfurter, J., dissenting).

> seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.
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> . . . . .
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> "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
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> "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman." *Id.*, at 180–181.

Justice Jackson's reference to his experience at Nuremberg should remind us of the importance of considering the consequences of today's decision for "Everyman."

The exclusionary rule is designed to prevent violations of the Fourth Amendment.[28] "Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U. S. 206, 217 (1960).[29] If the police cannot use evidence obtained through warrants issued on less than probable cause, they have less incentive to seek those warrants, and magistrates have less incentive to issue them.

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[28] For at least two reasons, the exclusionary rule is a better remedy than a civil action against an offending officer. Unlike the fear of personal liability, it should not create excessive deterrence; moreover, it avoids the obvious unfairness of subjecting the dedicated officer to the risk of mone-

Today's decisions do grave damage to that deterrent function. Under the majority's new rule, even when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait. No longer must they hesitate and seek additional evidence in doubtful cases. Thus, what we

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tary liability for a misstep while endeavoring to enforce the law. Society, rather than the individual officer, should accept the responsibility for inadequate training or supervision of officers engaged in hazardous police work. What THE CHIEF JUSTICE wrote, some two decades ago, remains true today:

> "It is the proud claim of a democratic society that the people are masters and all officials of the state are servants of the people. That being so, the ancient rule of *respondeat superior* furnishes us with a simple, direct and reasonable basis for refusing to admit evidence secured in violation of constitutional or statutory provisions. Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer. Society as a whole is thus responsible and society is 'penalized' by refusing it the benefit of evidence secured by the illegal action. This satisfies me more than the other explanations because it seems to me that society—in a country like ours—*is* involved in and *is* responsible for what is done in its name and by its agents. Unlike the Germans of the 1930's and early '40's, we cannot say 'it is all The Leader's doing. I am not responsible.' In a representative democracy we are responsible, whether we like it or not. And so each of us is involved and each is in this sense responsible when a police officer breaks rules of law established for our common protection." Burger, Who Will Watch the Watchman?, 14 Am. U. L. Rev. 1, 14 (1964) (emphasis in original) (footnote omitted).

[29] See *Stone* v. *Powell*, 428 U. S. 465, 484 (1976); *United States* v. *Janis*, 428 U. S. 433, 443, n. 12 (1976); *United States* v. *Calandra*, 414 U. S. 338, 347–348 (1974); *Terry* v. *Ohio*, 392 U. S., at 29; *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 413 (1966); *Mapp* v. *Ohio*, 367 U. S. 643, 656 (1961).

said two Terms ago about a rule that would prevent exclusion except in cases in which the authorities violate well-settled law applies fully to the rule the Court adopts today:

> "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.'" *United States* v. *Johnson*, 457 U. S. 537, 561 (1982) (emphasis in original) (footnote omitted) (quoting *Desist* v. *United States*, 394 U. S. 244, 277 (1969) (Fortas, J., dissenting)).[30]

The Court is of course correct that the exclusionary rule cannot deter when the authorities have no reason to know that their conduct is unconstitutional. But when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution. The Court's approach—

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[30] See also LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U. Pitt. L. Rev. 307, 358 (1982); Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1401–1403 (1983); Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257, 395–397 (1984).

which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful—can only lead to an increased number of constitutional violations.

Thus, the Court's creation of a double standard of reasonableness inevitably must erode the deterrence rationale that still supports the exclusionary rule. But we should not ignore the way it tarnishes the role of the judiciary in enforcing the Constitution. For the original rationale for the exclusionary rule retains its force as well as its relevance:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks* v. *United States*, 232 U. S. 383, 392 (1914).[31]

Thus, "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . ." *Terry* v. *Ohio*, 392 U. S. 1, 13 (1968).[32] As the Court correctly notes,[33] we have refused to apply the exclusionary rule to collateral contexts in which its marginal efficacy is questionable; until today, however, every time the police have violated the applicable commands of the Fourth Amendment a court has been prepared to vindicate that Amendment by preventing the use of evidence so obtained in the prosecution's case in chief against those whose rights have been violated.[34] Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding.[35] In my judgment, the Constitution requires more. Courts simply cannot escape their responsibility for redressing constitutional violations if they admit evidence obtained through unreasonable searches and seizures, since the entire point of police conduct that violates the Fourth Amendment is to obtain evidence for use at trial. If such evidence is admitted, then the courts become not merely the final and necessary link in an unconstitutional chain of events, but its actual motivating force. "If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (Holmes, J., dissenting). Nor should we so easily concede the existence of a constitutional violation for which there is no remedy.[36] To do so is to convert a Bill of *Rights* into an unenforced honor code that the police may follow in their discretion. The Constitution requires more; it requires a *remedy*.[37] If the Court's new rule is to be followed, the Bill of Rights should be renamed.

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[31] The Court continued:

"The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the things for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure . . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U. S., at 393–394.

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[32] See *United States* v. *Peltier*, 422 U. S. 531, 536 (1975); *Lee* v. *Florida*, 392 U. S. 378, 385–386 (1968); *Berger* v. *New York*, 388 U. S. 41, 50 (1967); *Mapp* v. *Ohio*, 367 U. S., at 647–650; *Byars* v. *United States*, 273 U. S., at 33–34.

[33] *United States* v. *Leon*, *ante*, at 908–913.

[34] Indeed, we have concluded that judicial integrity is not compromised by the refusal to apply the exclusionary rule to collateral contexts precisely because the defendant is able to vindicate his rights in the primary context—his trial and direct appeal therefrom. See *Stone* v. *Powell*, 428 U. S., at 485–486.

[35] As the majority recognizes, *United States* v. *Leon*, *ante*, at 922–923, and n. 23, in all cases in which its "good faith" exception to the exclusionary rule would operate, there will also be immunity from civil damages. See also *United States* v. *Ross*, 456 U. S. 798, 823, n. 32 (1982); *Stadium Films, Inc.* v. *Baillargeon*, 542 F. 2d 577, 578 (CA1 1976); *Madison* v. *Manter*, 441 F. 2d 537 (CA1 1971). See generally *Pierson* v. *Ray*, 386 U. S. 547 (1967). The Court amazingly suggests that in some cases in which suppression would not be appropriate courts should nevertheless adjudicate the merits of Fourth Amendment claims to provide guidance to police and magistrates but not a remedy. *United States* v. *Leon*, *ante*, at 925. Not only is the propriety of deciding constitutional questions in the absence of the strict necessity to do so open to serious question, see *Bowen* v. *United States*, 422 U. S. 916, 920 (1975), but such a proceeding, in which a court would declare that the Constitution had been violated but that it was unwilling to do anything about it, seems almost a mockery: "[T]he assurance against unreasonable federal searches and seizures would be

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'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties." *Mapp* v. *Ohio*, 367 U. S., at 655. See also *Segura* v. *United States*, *ante*, at 838–840 (STEVENS, J., dissenting).

[36] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). See generally Schrock & Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 350–372 (1974).

[37] See Stewart, 83 Colum. L. Rev., at 1383–1384 (footnotes omitted) ("In my opinion, however, the framers did not intend the Bill of Rights to be no more than unenforceable guiding principles—no more than a code of ethics under an honor system. The proscriptions and guarantees in the amendments were intended to create legal rights and duties"). See also Ervin, The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment, 1983 S. Ct. Rev. 283. In fact, if the Constitution of the United States does not compel use of the exclusionary rule, *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which the majority does not purport to question, could not have been decided as it was. See *id.*, at 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

It is of course true that the exclusionary rule exerts a high price—the loss of probative evidence of guilt. But that price is one courts have often been required to pay to serve important social goals.[38] That price is also one the Fourth Amendment requires us to pay, assuming as we must that the Framers intended that its strictures "shall not be violated." For in all such cases, as Justice Stewart has observed, "the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place."[39]

> "[T]he forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught." *Harris* v. *United States*, 331 U. S. 145, 198 (1947) (Jackson, J., dissenting).[40]

We could, of course, facilitate the process of administering justice to those who violate the criminal laws by ignoring the commands of the Fourth Amendment—indeed, by ignoring the entire Bill of Rights—but it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency. In a just society those who govern, as well as those who are governed, must obey the law.

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[38] The exclusion of probative evidence in order to serve some other policy is by no means unique to the Fourth Amendment. In his famous treatise on evidence, Dean Wigmore devoted an entire volume to such exclusionary rules, which are common in the law of evidence. See 8 J. Wigmore, Evidence (J. McNaughton rev. 1961) (discussing, *inter alia*, marital privilege, attorney-client privilege, communications among jurors, state secrets privilege, physician-patient privilege, priest-penitent privilege).

[39] Stewart, 83 Colum. L. Rev., at 1392 (footnote omitted). See also Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. J. 319, 322 ("Ah, but surely the guilty should not go free? However grave the question, it seemed improperly directed at the exclusionary rule. The hard answer is in the United States Constitution as well as in state constitutions. They make it clear that the guilty would go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them").

[40] See also *United States* v. *Di Re*, 332 U. S. 581, 595 (1948).

While I concur in the Court's judgment in No. 82–963, I would vacate the judgment in No. 82–1771 and remand the case to the Court of Appeals for reconsideration in the light of *Gates*. Accordingly, I respectfully dissent from the disposition in No. 82–1771.

# MASSACHUSETTS *v.* SHEPPARD

## CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 82–963. Argued January 17, 1984—Decided July 5, 1984

On the basis of evidence gathered in the investigation of a homicide in the Roxbury section of Boston, a police detective drafted an affidavit to support an application for an arrest warrant and a search warrant authorizing the search of respondent's residence. The affidavit stated that the police wished to search for certain described items, including clothing of the victim and a blunt instrument that might have been used on the victim. The affidavit was reviewed and approved by the District Attorney. Because it was Sunday, the local court was closed, and the police had a difficult time finding a warrant application form. The detective finally found a warrant form previously used in another district to search for controlled substances. After making some changes in the form, the detective presented it and the affidavit to a judge at his residence, informing him that the warrant form might need to be further changed. Concluding that the affidavit established probable cause to search respondent's residence and telling the detective that the necessary changes in the warrant form would be made, the judge made some changes, but did not change the substantive portion, which continued to authorize a search for controlled substances, nor did he alter the form so as to incorporate the affidavit. The judge then signed the warrant and returned it and the affidavit to the detective, informing him that the warrant was sufficient authority in form and content to carry out the requested search. The ensuing search of respondent's residence by the detective and other police officers was limited to the items listed in the affidavit, and several incriminating pieces of evidence were discovered. Thereafter, respondent was charged with first-degree murder. At a pretrial suppression hearing, the trial judge ruled that notwithstanding the warrant was defective under the Fourth Amendment in that it did not particularly describe the items to be seized, the incriminating evidence could be admitted because the police had acted in good faith in executing what they reasonably thought was a valid warrant. At the subsequent trial, respondent was convicted. The Massachusetts Supreme Judicial Court held that the evidence should have been suppressed.

*Held:* Federal law does not require the exclusion of the disputed evidence. Pp. 987–991.

(a) The exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid. *United States* v. *Leon*, *ante*, p. 897. Pp. 987–988.

(b) Here, there was an objectively reasonable basis for the officers' mistaken belief that the warrant authorized the search they conducted. The officers took every step that could reasonably be expected of them. At the point where the judge returned the affidavit and warrant to the detective, a reasonable police officer would have concluded, as the detective did, that the warrant authorized a search for the materials outlined in the affidavit. Pp. 988–989.

(c) A police officer is not required to disbelieve a judge who has just advised him that the warrant he possesses authorizes him to conduct the search he has requested. Pp. 989–990.

(d) An error of constitutional dimensions may have been committed with respect to the issuance of the warrant in this case, but it was the judge, not the police officer, who made the critical mistake. Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurance that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Pp. 990–991.

387 Mass. 488, 441 N. E. 2d 725, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *ante*, p. 960. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *ante*, p. 928.

*Barbara A. H. Smith*, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With her on the briefs were *Francis X. Bellotti*, Attorney General, *Newman Flanagan*, and *Michael J. Traft*.

*John Reinstein* argued the cause for respondent. With him on the brief was *Nancy Gertner*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Kathryn A. Oberly*, and *Robert J. Erickson;* for the State of Arkansas et al. by *John Steven Clark*, Attorney General of Arkansas, *Wilkes C. Robinson*, and *Dan M. Peterson;* for Laws at Work et al. by *Robert F. Kane, George Deukmejian*, Governor of California, *John Jay Douglass, G. Joseph Bertain, Jr., Lloyd Dunn, Donald E. Santarelli,*

JUSTICE WHITE delivered the opinion of the Court.

This case involves the application of the rules articulated today in *United States* v. *Leon*, *ante*, p. 897, to a situation in

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*Robert L. Toms*, and *Harold S. Voegelin;* for the National District Attorneys Association, Inc., by *Newman A. Flanagan, Austin J. McGuigan, John M. Massameno, Edwin L. Miller, Jr., Jack E. Yelverton*, and *James P. Manak;* and for Seven Former Members of the Attorney General's Task Force on Violent Crime et al. by *David L. Crump, Frank G. Carrington, Griffin B. Bell, Wayne W. Schmidt, James P. Manak, Fred E. Inbau, Rufus L. Edmisten*, Attorney General of North Carolina, and *David S. Crump*, Deputy Attorney General.

*James J. Brosnahan* filed a brief for the Bar Association of San Francisco et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Florida et al. by *Jim Smith*, Attorney General of Florida, and *Lawrence A. Kaden* and *Raymond L. Marky*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *John K. Van de Kamp* of California, *Duane Woodard* of Colorado, *Austin J. McGuigan* of Connecticut, *Charles M. Oberly III* of Delaware, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *Jim Jones* of Idaho, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Bill Allain* of Mississippi, *Michael T. Greely* of Montana, *Brian McKay* of Nevada, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Michael C. Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *T. Travis Medlock* of South Carolina, *David L. Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Gerald L. Baliles* of Virginia, *Ken Eikenberry* of Washington, *Chauncey H. Browning, Jr.*, of West Virginia, *Bronson C. La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; for the Appellate Committee of the California District Attorneys Association by *Robert H. Philibosian, Harry B. Sondheim*, and *Roderick W. Leonard;* for the Illinois State Bar Association by *Michael J. Costello, Albert Hofeld, William J. Martin*, and *Joshua Sachs;* for the Committee on Criminal Law of the Association of the Bar of the City of New York by *Peter L. Zimroth* and *Barbara D. Underwood;* for the National Association of Criminal Defense Lawyers et al. by *Marshall W. Krause, Steffan B. Imhoff*, and *Charles Scott Spear;* for the National Legal Aid and Defender Association by *Kenneth M. Mogill;* and for Dan Johnston, County Attorney, Polk County, Iowa, by *Mr. Johnston, pro se.*

which police officers seize items pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge.

## I

The badly burned body of Sandra Boulware was discovered in a vacant lot in the Roxbury section of Boston at approximately 5 a. m., Saturday, May 5, 1979. An autopsy revealed that Boulware had died of multiple compound skull fractures caused by blows to the head. After a brief investigation, the police decided to question one of the victim's boyfriends, Osborne Sheppard. Sheppard told the police that he had last seen the victim on Tuesday night and that he had been at a local gaming house (where card games were played) from 9 p. m. Friday until 5 a. m. Saturday. He identified several people who would be willing to substantiate the latter claim.

By interviewing the people Sheppard had said were at the gaming house on Friday night, the police learned that although Sheppard was at the gaming house that night, he had borrowed an automobile at about 3 o'clock Saturday morning in order to give two men a ride home. Even though the trip normally took only 15 minutes, Sheppard did not return with the car until nearly 5 a. m.

On Sunday morning, police officers visited the owner of the car Sheppard had borrowed. He consented to an inspection of the vehicle. Bloodstains and pieces of hair were found on the rear bumper and within the trunk compartment. In addition, the officers noticed strands of wire in the trunk similar to wire strands found on and near the body of the victim. The owner of the car told the officers that when he last used the car on Friday night, shortly before Sheppard borrowed it, he had placed articles in the trunk and had not noticed any stains on the bumper or in the trunk.

On the basis of the evidence gathered thus far in the investigation, Detective Peter O'Malley drafted an affidavit designed to support an application for an arrest warrant and a search warrant authorizing a search of Sheppard's residence.

The affidavit set forth the results of the investigation and stated that the police wished to search for

> "[a] fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal) possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above [T]hunderbird. Blunt instrument that might have been used on the victim. Men's or women's clothing that may have blood, gasoline, burns on them. Items that may have fingerprints of the victim."[1]

Detective O'Malley showed the affidavit to the District Attorney, the District Attorney's first assistant, and a sergeant, who all concluded that it set forth probable cause for the search and the arrest. 387 Mass. 488, 492, 441 N. E. 2d 725, 727 (1982).

Because it was Sunday, the local court was closed, and the police had a difficult time finding a warrant application form. Detective O'Malley finally found a warrant form previously in use in the Dorchester District. The form was entitled "Search Warrant—Controlled Substance G. L. c. 276 §§1 through 3A." Realizing that some changes had to be made before the form could be used to authorize the search requested in the affidavit, Detective O'Malley deleted the subtitle "controlled substance" with a typewriter. He also substituted "Roxbury" for the printed "Dorchester" and typed Sheppard's name and address into blank spaces provided for that information. However, the reference to "controlled substance" was not deleted in the portion of the form that constituted the warrant application and that, when signed, would constitute the warrant itself.

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[1] The liquor and marihuana were included in the request because Sheppard had told the officers that when he was last with the victim, the two had purchased two bags of marihuana and a fifth of amaretto before going to his residence.

Detective O'Malley then took the affidavit and the warrant form to the residence of a judge who had consented to consider the warrant application. The judge examined the affidavit and stated that he would authorize the search as requested. Detective O'Malley offered the warrant form and stated that he knew the form as presented dealt with controlled substances. He showed the judge where he had crossed out the subtitles. After unsuccessfully searching for a more suitable form, the judge informed O'Malley that he would make the necessary changes so as to provide a proper search warrant. The judge then took the form, made some changes on it, and dated and signed the warrant. However, he did not change the substantive portion of the warrant, which continued to authorize a search for controlled substances;[2] nor did he alter the form so as to incorporate the affidavit. The judge returned the affidavit and the warrant to O'Malley, informing him that the warrant was sufficient authority in form and content to carry out the search as requested.[3] O'Malley took the two documents and, accompanied by other officers, proceeded to Sheppard's residence.

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[2] The warrant directed the officers to "search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action . . . ."

[3] Sheppard contends that there is no evidence in the record that the judge spoke to O'Malley after he made the changes. Brief for Respondent 11, n. 4. However, the trial judge expressly found that the judge "informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested," App. 27a, and a plurality of the Supreme Judicial Court noted that finding without any apparent disapproval. 387 Mass. 488, 497, 441 N. E. 2d 725, 730 (1982). Since it would have been reasonable for O'Malley to infer that the warrant was valid when the judge made some changes after assuring him that the form would be corrected, an express assurance that the warrant was adequate would add little to the reasonableness of O'Malley's belief that the necessary changes had been made. Therefore, nothing would be served by combing the record to determine whether there is sufficient evidence to support the trial court's finding that the judge spoke to O'Malley after signing the warrant.

The scope of the ensuing search was limited to the items listed in the affidavit, and several incriminating pieces of evidence were discovered.[4] Sheppard was then charged with first-degree murder.

At a pretrial suppression hearing, the trial judge concluded that the warrant failed to conform to the commands of the Fourth Amendment because it did not particularly describe the items to be seized. The judge ruled, however, that the evidence could be admitted notwithstanding the defect in the warrant because the police had acted in good faith in executing what they reasonably thought was a valid warrant. App. 35a. At the subsequent trial, Sheppard was convicted.

On appeal, Sheppard argued that the evidence obtained pursuant to the defective warrant should have been suppressed. The Supreme Judicial Court of Massachusetts agreed. A plurality of the justices concluded that although "the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge," 387 Mass., at 503, 441 N. E. 2d, at 733, the evidence had to be excluded because this Court had not recognized a good-faith exception to the exclusionary rule. Two justices combined in a separate concurrence to stress their rejection of the good-faith exception, and one justice dissented, contending that since exclusion of the evidence in this case would not serve to deter any police misconduct, the evidence should be admitted. We granted certiorari and set the case for argument in conjunction with *United States* v. *Leon*, *ante*, p. 897. 463 U. S. 1205 (1983).

## II

Having already decided that the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid, *ante*, at 922–923, the sole issue before us in this case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant.[5] There is no dispute that the officers believed that the warrant authorized the search that they conducted. Thus, the only question is whether there was an objectively reasonable basis for the officers' mistaken belief. Both the trial court, App. 35a, and a majority of the Supreme Judicial Court, 387 Mass., at 503, 441 N. E. 2d, at 733; *id.*, at 524–525, 441 N. E. 2d, at 745 (Lynch, J., dissenting), concluded that there was. We agree.

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[4] The police found a pair of bloodstained boots, bloodstains on the concrete floor, a woman's earring with bloodstains on it, a bloodstained envelope, a pair of men's jockey shorts and women's leotards with blood on them, three types of wire, and a woman's hairpiece, subsequently identified as the victim's.

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[5] Both the trial court, App. 32a, and a majority of the Supreme Judicial Court, 387 Mass., at 500–501, 441 N. E. 2d, at 731–732; *id.*, at 510, 441 N. E. 2d, at 737 (Liacos, J., joined by Abrams, J., concurring), concluded that the warrant was constitutionally defective because the description in the warrant was completely inaccurate and the warrant did not incorporate the description contained in the affidavit. Petitioner does not dispute this conclusion.

Petitioner does argue, however, that even though the warrant was invalid, the search was constitutional because it was reasonable within the meaning of the Fourth Amendment. Brief for Petitioner 28–32. The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. *Stanford* v. *Texas*, 379 U. S. 476 (1965); *United States* v. *Cardwell*, 680 F. 2d 75, 77–78 (CA9 1982); *United States* v. *Crozier*, 674 F. 2d 1293, 1299 (CA9 1982); *United States* v. *Klein*, 565 F. 2d 183, 185 (CA1 1977); *United States* v. *Gardner*, 537 F. 2d 861, 862 (CA6 1976); *United States* v. *Marti*, 421 F. 2d 1263, 1268–1269 (CA2 1970). That rule is in keeping with the well-established principle that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967). See *Steagald* v. *United States*, 451 U. S. 204, 211–212 (1981); *Jones* v. *United States*, 357 U. S. 493, 499 (1958). Whether the present case fits into one of those carefully defined classes is a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity.

The officers in this case took every step that could reasonably be expected of them. Detective O'Malley prepared an affidavit which was reviewed and approved by the District Attorney. He presented that affidavit to a neutral judge. The judge concluded that the affidavit established probable cause to search Sheppard's residence, App. 26a, and informed O'Malley that he would authorize the search as requested. O'Malley then produced the warrant form and informed the judge that it might need to be changed. He was told by the judge that the necessary changes would be made. He then observed the judge make some changes and received the warrant and the affidavit. At this point, a reasonable police officer would have concluded, as O'Malley did, that the warrant authorized a search for the materials outlined in the affidavit.

Sheppard contends that since O'Malley knew the warrant form was defective, he should have examined it to make sure that the necessary changes had been made. However, that argument is based on the premise that O'Malley had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made. Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized,[6] we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested. In Massachusetts, as in most jurisdictions, the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure. *Streeter* v. *City of Worcester*, 336 Mass. 469, 472, 146 N. E. 2d 514, 517 (1957); *Moll* v. *Township of Wakefield*, 274 Mass. 505, 507, 175 N. E. 81, 82 (1931). If an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason why he should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems.

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[6] Normally, when an officer who has not been involved in the application stage receives a warrant, he will read it in order to determine the object of the search. In this case, Detective O'Malley, the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items. Whether an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the search would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested.

In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Illinois* v. *Gates*, 462 U. S. 213, 263 (1983) (WHITE, J., concurring in judgment).[7] Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case. The judgment of the Supreme Judicial Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

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[7] This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant." *Illinois* v. *Gates*, 462 U. S., at 264 (WHITE, J., concurring in judgment). The judge's error was not in concluding that a warrant should issue but in failing to make the necessary changes on the form. Indeed, Sheppard admits that if the judge had crossed out the reference to controlled substances, written "see attached affidavit" on the form, and attached the affidavit to the warrant, the warrant would have been valid. Tr. of Oral Arg. 27, 50. See *United States* v. *Johnson*, 690 F. 2d 60, 64–65 (CA3 1982), cert. denied, 459 U. S. 1214 (1983); *In re Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F. 2d 1317, 1318–1319 (CA9 1981); *United States* v. *Johnson*, 541 F. 2d 1311, 1315–1316 (CA8 1976); *United States* v. *Womack*, 166 U. S. App. D. C. 35, 49, 509 F. 2d 368, 382 (1974); *Commonwealth* v. *Todisco*, 363 Mass. 445, 450, 294 N. E. 2d 860, 864 (1973).

*It is so ordered.*

[For opinion of JUSTICE STEVENS concurring in the judgment, see *ante*, p. 960.]

[For dissenting opinion of JUSTICE BRENNAN, see *ante*, p. 928.]

# SMITH ET AL. *v.* ROBINSON, RHODE ISLAND ASSOCIATE COMMISSIONER OF EDUCATION, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–2120. Argued March 28, 1984—Decided July 5, 1984

When the Superintendent of Schools in Cumberland, R. I., informed petitioner parents of petitioner child, who suffers from cerebral palsy and other handicaps, that the School Committee no longer would fund the child's placement in a special educational program, the parents, in addition to appealing the Superintendent's decision to the School Committee and thereafter through the state administrative process, filed an action in Federal District Court against the School Committee and, subsequently, against certain state school officials. They asserted, at various points in the proceedings, claims for declaratory and injunctive relief based on state law, on the Education of the Handicapped Act (EHA), on § 504 of the Rehabilitation Act of 1973, and, with respect to certain federal constitutional claims, on 42 U. S. C. § 1983. The District Court held that the child was entitled, as a matter of state law, to a free appropriate special education paid for by the School Committee, and that it was therefore unnecessary and improper to reach petitioners' federal statutory and constitutional claims. By agreement between the parties, the court awarded attorney's fees against the School Committee. Petitioners then requested attorney's fees against the state defendants. The District Court held that petitioners were entitled to such fees for the hours spent in the state administrative process both before and after the date the state defendants were named as parties, reasoning that because petitioners were required to exhaust their EHA remedies before asserting their § 1983 and § 504 claims, they were entitled to fees for those procedures. The Court of Appeals reversed, holding that since the action and relief granted fell within the reach of the EHA, which establishes a comprehensive federal-state scheme for the provision of special education to handicapped children but does not provide for attorney's fees, the District Court had to look to 42 U. S. C. § 1988 and § 505 of the Rehabilitation Act for such fees. The Court of Appeals concluded that even if the unaddressed § 1983 claims were substantial enough to support federal jurisdiction so as generally to warrant an award of attorney's fees, nevertheless, given the comprehensiveness of the EHA, Congress could not have intended its omission of attorney's fees relief in that statute to be rectified by recourse to § 1988. The court disposed of the Rehabilitation Act basis for attorney's fees for similar reasons.

*Held:*

1. Petitioners were not entitled to attorney's fees under § 1988. Pp. 1006–1016.

(a) The fact that petitioners prevailed on their initial claim that the School Committee violated due process by refusing to grant petitioners a full hearing before terminating funding of petitioner child's special education program does not by itself entitle petitioners to attorney's fees for the subsequent administrative and judicial proceedings. That due process claim was entirely separate from the claims made in the subsequent proceedings, and was not sufficiently related to petitioners' ultimate success to support an award of fees for the entire proceeding. Pp. 1008–1009.

(b) As to petitioners' claim that the child was being discriminated against on the basis of his handicapped condition, in violation of the Equal Protection Clause of the Fourteenth Amendment, it is apparent that Congress intended the EHA to be the exclusive avenue through which such a claim can be pursued. The EHA is a comprehensive scheme to aid the States in complying with their constitutional obligations to provide public education for the handicapped. Allowing a plaintiff to circumvent the EHA's administrative remedies by relying on § 1983 as a remedy for a substantial equal protection claim would be inconsistent with that scheme. Pp. 1009–1013.

(c) Even if petitioners' due process challenge to the partiality of the state hearing officer who reviewed the School Committee's decision might be maintained as an independent challenge, petitioners are not entitled to attorney's fees for such claim. That claim had no bearing on the substantive claim, on which petitioners prevailed, that the School Committee, as a matter of state and federal law, was required to pay for petitioner child's education. Where petitioners presented different claims for different relief, based on different facts and legal theories, and prevailed only on a nonfee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through § 1983. Pp. 1013–1016.

2. Nor were petitioners entitled to attorney's fees under § 505 of the Rehabilitation Act. Congress struck a careful balance in the EHA between clarifying and making enforceable the rights of handicapped children to a free appropriate public education and endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights. It could not have intended a handicapped child to upset that balance by relying on § 504 for otherwise unavailable damages or for

an award of attorney's fees. Where, as here, whatever remedy might be provided under § 504—which prevents discrimination on the basis of a handicap in any program receiving federal financial assistance—is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to § 504. Pp. 1016–1021.

703 F. 2d 4, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 1021.

*E. Richard Larson* argued the cause for petitioners. With him on the briefs were *Burt Neuborne*, *Charles S. Sims*, and *Ivan E. Bodensteiner*.

*Forrest L. Avila* argued the cause and filed a brief for respondents.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents questions regarding the award of attorney's fees in a proceeding to secure a "free appropriate public education" for a handicapped child. At various stages in the proceeding, petitioners asserted claims for relief based on state law, on the Education of the Handicapped Act (EHA), 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.*, on § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794, and on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The United States Court of Appeals

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*Briefs of *amici curiae* urging reversal were filed for the Association for Children and Adults with Learning Disabilities by *Matthew B. Bogin;* and for the Association for Retarded Citizens of the United States et al. by *Leonard Rieser*.

*Inez Smith Reid*, Corporation Cousel, *John H. Suda*, Principal Deputy Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Richard B. Nettler*, Assistant Corporation Counsel, filed a brief for the District of Columbia as *amicus curiae* urging affirmance.

*Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon* filed a brief for the National School Boards Association as *amicus curiae*.

for the First Circuit concluded that because the proceeding, in essence, was one to enforce the provisions of the EHA, a statute that does not provide for the payment of attorney's fees, petitioners were not entitled to such fees. *Smith* v. *Cumberland School Committee*, 703 F. 2d 4 (1983). Petitioners insist that this Court's decision in *Maher* v. *Gagne*, 448 U. S. 122 (1980), compels a different conclusion.

## I

The procedural history of the case is complicated, but it is significant to the resolution of the issues. Petitioner Thomas F. Smith III (Tommy), suffers from cerebral palsy and a variety of physical and emotional handicaps. When this proceeding began in November 1976, Tommy was eight years old. In the preceding December, the Cumberland School Committee had agreed to place Tommy in a day program at Emma Pendleton Bradley Hospital in East Providence, R. I., and Tommy began attending that program. In November 1976, however, the Superintendent of Schools informed Tommy's parents, who are the other petitioners here, that the School Committee no longer would fund Tommy's placement because, as it construed Rhode Island law, the responsibility for educating an emotionally disturbed child lay with the State's Division of Mental Health, Retardation and Hospitals (MHRH). App. 25–26.

Petitioners took an appeal from the decision of the Superintendent to the School Committee. In addition, petitioners filed a complaint under 42 U. S. C. § 1983 in the United States District Court for the District of Rhode Island against the members of the School Committee, asserting that due process required that the Committee comply with "Article IX—Procedural Safeguards" of the Regulations adopted by the State Board of Regents regarding Education of Handicapped Children (Regulations)[1] and that Tommy's placement in his program be continued pending appeal of the Superintendent's decision.

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[1] In November 1976, Rhode Island, through its Board of Regents for Education, was in the process of promulgating new regulations concerning

In orders issued in December 1976 and January 1977, the District Court entered a temporary restraining order and then a preliminary injunction. The court agreed with petitioners that the Regulations required the School Committee to continue Tommy in his placement at Bradley Hospital pending appeal of the Superintendent's decision. The School Committee's failure to follow the Regulations, the court concluded, would constitute a deprivation of due process.

On May 10, 1978, petitioners filed a first amended complaint. App. 49. By that time, petitioners had completed the state administrative process. They had appealed the Superintendent's decision to the School Committee and then to the State Commissioner of Education, who delegated responsibility for conducting a hearing to an Associate Commissioner of Education. Petitioners had moved that the Associate Commissioner recuse himself from conducting the review of the School Committee's decision, since he was an employee of the state education agency and therefore not an impartial hearing officer. The Associate Commissioner denied the motion to recuse.

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the education of handicapped children. The old regulations, approved in 1963, had been issued by the State Department of Education and were entitled "Regulations—Education of Handicapped Children." Most of the new Regulations became effective October 1, 1977. Article IX of Section One, however, was made effective June 14, 1976. See Section One, Art. XII.

The Regulations were promulgated pursuant to R. I. Gen. Laws § 16-24-2 (1981). The immediately preceding section, § 16-24-1, sets out the duty of the local school committee to provide for a child, "who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented," such type of special education "that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of regents for education in accordance with its regulations." Section 16-24-1 has its origin in 1952 R. I. Pub. Laws, ch. 2905, § 1, and was in effect in November 1976.

All the state officers agreed that, under R. I. Gen. Laws, Tit. 40, ch. 7 (1977), the responsibility for educating Tommy lay with MHRH.[2] The Associate Commissioner acknowledged petitioners' argument that since § 40.1–7–8 would require them to pay a portion of the cost of services provided to Tommy,[3] the statute conflicted with the EHA, but concluded that the problem was not within his jurisdiction to resolve.

In their first amended complaint, petitioners added as defendants the Commissioner of Education, the Associate Commissioner of Education, the Board of Regents for Education, and the Director of MHRH. They also specifically relied for the first time on the EHA, noting that at all times mentioned in the complaint, the State of Rhode Island had submitted a plan for state-administered programs of special education and related services and had received federal funds pursuant to the EHA.[4]

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[2] Under § 40.1–7–3, enacted by 1971 R. I. Pub. Laws, ch. 89, art. 1, § 1, MHRH is charged "with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children and to cooperate to this end with all reputable agencies of a public or private character serving such children . . . ."

[3] Section 40.1–7–8 provides: "The parents of children in the program, depending upon their resources, shall be obligated to participate in the costs of the care and treatment of their children in accordance with regulations to be promulgated by the director."

[4] The 1975 amendment to the EHA, on which petitioners rely, became effective October 1, 1977. Prior to that date, the federal requirements governing States which, like Rhode Island, submitted state plans and received federal money for the education of handicapped children were found in the EHA, 84 Stat. 175, as amended in 1974, 88 Stat. 579. The obligations imposed on a State by that Act were to expend federal money on programs designed to benefit handicapped children. From August 1974 to September 30, 1977, the Act also required that parents be given minimal due process protections when the State proposed to change the educational placement of the child. 88 Stat. 582. The state hearing process in this case began on January 20, 1977, with a hearing before the School Committee. By the time petitioners' appeal progressed to the Associate Commissioner of Education on November 2, 1977, the 1975

In the first count of their amended complaint, petitioners challenged the fact that both the hearing before the School Committee and the hearing before the Associate Commissioner were conducted before examiners who were employees of the local or state education agency. They sought a declaratory judgment that the procedural safeguards contained in Article IX of the Regulations did not comply with the Due Process Clause of the Fourteenth Amendment or with the requirements of the EHA, 20 U. S. C. § 1415, and its accompanying regulations. They also sought an injunction prohibiting the Commissioner and Associate Commissioner from conducting any more hearings in review of decisions of the Rhode Island local education agencies (LEA's) unless and until the Board of Regents adopted regulations that conformed to the requirements of § 1415 and its regulations. Finally, they sought reasonable attorney's fees and costs.

In the second count of their amended complaint, petitioners challenged the substance of the Associate Commissioner's decision. In their view, the decision violated Tommy's rights "under federal and state law to have his LEA provide a free, appropriate educational placement without regard to whether or not said placement can be made within the local school system." App. 61. They sought both a declaratory judgment that the School Committee, not MHRH, was responsible for providing Tommy a free appropriate education, and an injunction requiring the School Committee to provide Tommy such an education. They also asked for reasonable attorney's fees and costs.

On December 22, 1978, the District Court issued an opinion acknowledging confusion over whether, as a matter of state law, the School Committee or MHRH was responsible for funding and providing the necessary services for Tommy. *Id.*, at 108. The court also noted that if the Associate

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Act was in effect. Unless otherwise indicated, future references to the "EHA" refer to the 1975 amendments to that Act.

Commissioner were correct that Tommy's education was governed by § 40.1–7, the state scheme would appear to be in conflict with the requirements of the EHA, since § 40.1–7 may require parental contribution and may not require MHRH to provide education at all if it would cause the Department to incur a deficit. At the request of the state defendants, the District Court certified to the Supreme Court of Rhode Island the state-law questions whether the School Committee was required to provide special education for a resident handicapped student if the local educational programs were inadequate, and whether the cost of such programs was the responsibility of the local School Committee or of the MHRH.

On May 29, 1979, the District Court granted partial summary judgment for the defendants on petitioners' claim that they were denied due process by the requirement of the Regulations that they submit their dispute to the School Committee and by the Associate State Commissioner's refusal to recuse himself. The court noted that the School Committee's members were not "employees" of the local education agency, but elected officials, and determined that the provision of the EHA directing that no hearing shall be conducted by an employee of an agency or unit involved in the education or care of the child does not apply to hearings conducted by the state education agency.

On June 3, 1980, the Rhode Island Supreme Court issued an opinion answering the certified questions. *Smith* v. *Cumberland School Committee*, 415 A. 2d 168. Noting the responsibility of the Board of Regents for Education to comply with the requirements of the EHA, the court determined that the primary obligation of financing a handicapped child's special education lay with the local School Committee. Whatever obligation § 40.1–7 imposes on MHRH to provide educational services is limited and complements, rather than supplants, the obligations of School Committees under § 16.24–1.

Petitioners thereafter filed their second amended and supplemental complaint. App. 152. In it they added to Count II claims for relief under the Equal Protection Clause of the Fourteenth Amendment and under § 504 of the Rehabilitation Act of 1973, as amended, 29 U. S. C. § 794. They also requested attorney's fees under 42 U. S. C. § 1988 and what was then 31 U. S. C. § 1244(e) (1976 ed.).[5]

On January 12, 1981, the District Court issued an order declaring petitioners' rights, entering a permanent injunction against the School Committee defendants, and approving an award of attorney's fees against those defendants. App. 172. The court ordered the School Committee to pay the full cost of Tommy's attendance at Harmony Hill School, Tommy's then-current placement. By agreement between petitioners and the School Committee and without prejudice to petitioners' claims against the other defendants, the court awarded attorney's fees in the amount of $8,000, pursuant to 42 U. S. C. § 1988 and the then 31 U. S. C. § 1244 (e) (1976 ed.).

On June 4, 1981, the District Court issued two orders, this time addressed to petitioners' claims against the state defendants. In the first order, App. 177, the court denied the state defendants' motion to dismiss. In the second order, *id.*, at 189, the court declared that Tommy is entitled to a free appropriate special education paid for by the Cumberland School Committee. The court noted that since Tommy was entitled to the relief he sought as a matter of state law, it was unnecessary and improper for the court to go further and reach petitioners' federal statutory and constitutional claims. Petitioners were given 14 days to move for an award of fees.

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[5] By the time of the filing of petitioners' second amended and supplemental complaint on September 16, 1980, attorney's fees were available directly under the Rehabilitation Act. See Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, § 120, 92 Stat. 2982, 29 U. S. C. § 794a. Instead of relying on that statute, however, petitioners relied on 31 U. S. C. § 1244(e) (1976 ed.) (now replaced by 31 U. S. C. § 6721(c)(2)), a statute that authorized a civil action to enforce § 504 of the Rehabilitation Act against any State or local government receiving federal funds under the State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, as amended by the State and Local Fiscal Assistance Amendments of 1976, 90 Stat. 2341. Section 1244(e) authorized an award of attorney's fees to a "prevailing party."

The Court of Appeals for the First Circuit affirmed in an unpublished *per curiam* opinion filed on January 11, 1982. It concluded that the Commissioner was not immune from injunctive relief and that petitioners' challenge to the District Court's award of summary judgment to respondents on their due process challenge was moot.

Petitioners requested fees and costs against the state defendants. *Id.*, at 195. On April 30, 1982, the District Court ruled orally that petitioners were entitled to fees and costs in the amount of $32,109 for the hours spent in the state administrative process both before and after the state defendants were named as parties to the federal litigation. App. to Pet. for Cert. A31–A58. Relying on *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), and its own opinion in *Turillo* v. *Tyson*, 535 F. Supp. 577 (1982), the court reasoned that because petitioners were required to exhaust their EHA remedies before bringing their § 1983 and § 504 claims, they were entitled to fees for those procedures. The court agreed with respondents that petitioners were not entitled to compensation for hours spent challenging the use of employees as hearing officers. No fees were awarded for hours spent obtaining the preliminary injunctive relief, as petitioners already had been compensated for that work by the School Committee defendants. Finally, the court rejected the defendants' argument that fees should not be allowed because this was an action under the EHA, which does not provide for fees. In the court's view, respondents had given insufficient weight to the fact that petitioners had alleged equal protection and § 1983 claims as well as the EHA claim. The court added that it found the equal protection claim petitioners included in their second amended complaint to be colorable and nonfrivolous. Petitioners thus were entitled to fees for prevailing in an action to enforce their § 1983 claim.

The Court of Appeals reversed. *Smith* v. *Cumberland School Committee*, 703 F. 2d 4 (CA1 1983). The court first noted that, under what is labeled the "American Rule," attorney's fees are available as a general matter only when statutory authority so provides. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). Here the action and relief granted in this case fell within the reach of the EHA, a federal statute that establishes a comprehensive federal-state scheme for the provision of special education to handicapped children, but that does not provide for attorney's fees.[6] For fees, the District Court had to look to § 1988 and § 505 of the Rehabilitation Act.

As to the § 1988 claim, the court acknowledged the general rule that when the claim upon which a plaintiff actually prevails is accompanied by a "substantial," though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate. *Maher* v. *Gagne*, 448 U. S., at 130–131. Here, petitioners' § 1983 claims arguably were at least substantial enough to support federal jurisdiction. *Ibid.* Even if the § 1983 claims were substantial, however, the Court of Appeals concluded that, given the comprehensiveness of the EHA, Congress could not have intended its omission of attorney's fees relief to be rectified by recourse to § 1988.

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[6] The District Court purported to award relief on the basis of state law. In light of the decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984), that was improper. The propriety of the injunctive relief, however, is not at issue here. We think the Court of Appeals was correct in treating the relief as essentially awarded under the EHA, since petitioners had challenged the State Commissioner's construction of state law on the basis of their rights under the EHA, and since the question of state law on which petitioners prevailed was certified by the District Court in an effort to avoid a Supremacy Clause conflict with the EHA. It is clear that the EHA creates a right, enforceable in federal court, to the free appropriate public education required by the statute. *Board of Education of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176 (1982); 20 U. S. C. § 1415(e)(2).

The Court of Appeals drew support for its conclusion from this Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981). There the Court held that where Congress had provided comprehensive enforcement mechanisms for protection of a federal right and those mechanisms did not include a private right of action, a litigant could not obtain a private right of action by asserting his claim under § 1983. The Court of Appeals recognized that *Sea Clammers* might not logically preclude a § 1983 action for violation of the EHA, since the EHA expressly recognizes a private right of action, but it does support the more general proposition that when a statute creates a comprehensive remedial scheme, intentional "omissions" from that scheme should not be supplanted by the remedial apparatus of § 1983. In the view of the Court of Appeals, the fact that the § 1983 claims alleged here were based on independent constitutional violations rather than violations of the EHA was immaterial. The constitutional claims alleged—a denial of due process and a denial of a free appropriate public education because of handicap—are factually identical to the EHA claims. If a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case.[7]

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[7] The Court of Appeals added that it did not intend to indicate that the EHA in any way limits the scope of a handicapped child's constitutional rights. Claims not covered by the EHA should still be cognizable under § 1983, with fees available for such actions. The court noted, for instance, that to the extent petitioners' securing of a preliminary injunction fell outside any relief available under the EHA, attorney's fees might be appropriate for that relief. Because the award of fees against the School Committee for work done in obtaining the preliminary injunction was not challenged on appeal, the court had no occasion to decide the issue.

The court disposed of the Rehabilitation Act basis for fees in a similar fashion. Even if Congress did not specifically intend to pre-empt § 504 claims with the EHA, the EHA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act.

Because of confusion in the Courts of Appeals over the proper interplay among the various statutory and constitutional bases for relief in cases of this nature, and over the effect of that interplay on the provision of attorney's fees,[8] we granted certiorari, 464 U. S. 932 (1983).

## II

Petitioners insist that the Court of Appeals simply ignored the guidance of this Court in *Maher* v. *Gagne*, *supra*, that a prevailing party who asserts substantial but unaddressed constitutional claims is entitled to attorney's fees under 42 U. S. C. § 1988. They urge that the reliance of the Court of Appeals on *Sea Clammers* was misplaced. *Sea Clammers* had to do only with an effort to enlarge a statutory remedy by asserting a claim based on that statute under the "and laws" provision of § 1983.[9] In this case, petitioners made no effort to enlarge the remedies available under the EHA by asserting their claim through the "and laws" provision of § 1983. They presented separate constitutional claims, properly cognizable under § 1983. Since the claim on which they prevailed and their constitutional claims arose out of a "'"common nucleus of operative fact,"'" *Maher* v. *Gagne*, 448 U. S., at 133, n. 15, quoting H. R. Rep. No. 94-1558, p. 4, n. 7 (1976), in turn quoting *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966), and since the constitutional claims were found by the District Court and assumed by the Court of Appeals to be substantial, petitioners urge that they are entitled to fees under § 1988. In addition, petitioners presented a substantial claim under § 504 of the Rehabilitation Act. Since § 505 of that Act authorizes attorney's fees in the same manner as does § 1988 and in fact incorporates the legislative history of § 1988, see 124 Cong. Rec. 30346 (1978) (remarks of Sen. Cranston), the reasoning of *Maher* applies to claims based on § 504. Petitioners therefore, it is claimed, are entitled to fees for substantial, though unaddressed, § 504 claims.

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[8] See, *e. g.*, *Quackenbush* v. *Johnson City School District*, 716 F. 2d 141 (CA2 1983) (§ 1983 remedy, including damages, available for claim that plaintiff was denied access to EHA procedures); *Department of Education of Hawaii* v. *Katherine D.*, 727 F. 2d 809 (CA9 1983) (EHA precludes reliance on § 1983 or § 504); *Robert M.* v. *Benton*, 671 F. 2d 1104 (CA8 1982) (fees available under § 1988 because plaintiff made colorable due process as well as EHA challenges to use of state agency employee as hearing officer); *Hymes* v. *Harnett County Board of Education*, 664 F. 2d 410 (CA4 1981) (claims made under the EHA, § 504, and § 1983; fees available for due process relief not available under the EHA); *Anderson* v. *Thompson*, 658 F. 2d 1205 (CA7 1981) (EHA claim not assertable under § 1983; attorney's fees therefore not available).

[9] Title 42 U. S. C. § 1983 provides a remedy for a deprivation, under color of state law, "of any rights, privileges, or immunities secured by the Constitution *and laws*" (emphasis added). In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), the Court held that § 1983 authorizes suits to redress viola-

Respondents counter that petitioners simply are attempting to circumvent the lack of a provision for attorney's fees in the EHA by resorting to the pleading trick of adding surplus constitutional claims and similar claims under § 504 of the Rehabilitation Act. Whatever Congress' intent was in authorizing fees for substantial, unaddressed claims based on § 1988 or § 505, it could not have been to allow plaintiffs to receive an award of attorney's fees in a situation where Congress has made clear its intent that fees not be available.

Resolution of this dispute requires us to explore congressional intent, both in authorizing fees for substantial un-

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tions by state officials of rights created by federal statutes as well as by the Federal Constitution and that fees are available under § 1988 for such statutory violations.

*Sea Clammers* excluded from the reach of *Thiboutot* cases in which Congress specifically foreclosed a remedy under § 1983. 453 U. S., at 19.

addressed constitutional claims and in setting out the elaborate substantive and procedural requirements of the EHA, with no indication that attorney's fees are available in an action to enforce those requirements. We turn first to petitioners' claim that they were entitled to fees under 42 U. S. C. § 1988 because they asserted substantial constitutional claims.

## III

As the legislative history illustrates and as this Court has recognized, § 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. *Maine* v. *Thiboutot*, 448 U. S. 1, 9 (1980); *Maher* v. *Gagne*, *supra; Hutto* v. *Finney*, 437 U. S. 678, 694 (1978); S. Rep. No. 94–1011, p. 4 (1976) (a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,'" quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)). Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional ground. *Maher* v. *Gagne*, 448 U. S., at 132. As the Court also has recognized, however, the authority to award fees in a case where the plaintiff prevails on substantial constitutional claims is not without qualification. Due regard must be paid, not only to the fact that a plaintiff "prevailed," but also to the relationship between the claims on which effort was expended and the ultimate relief obtained. *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983); *Blum* v. *Stenson*, 465 U. S. 886 (1984). Thus, for example, fees are not properly awarded for work done on a claim on which a plaintiff did not prevail and which involved distinctly different facts and legal theories from the claims on the basis of which relief was awarded. *Hensley* v. *Eckerhart*, 461 U. S., at 434–435, 440. Although, in most cases, there is no clear line between hours of work that contributed to a plaintiff's success and those that did not, district courts remain charged with the responsibility, imposed by Congress, of evaluating the award requested in light of the relationship between particular claims for which work is done and the plaintiff's success. *Id.*, at 436–437.

A similar analysis is appropriate in a case like this, where the prevailing plaintiffs rely on substantial, unaddressed constitutional claims as the basis for an award of attorney's fees. The fact that constitutional claims are made does not render automatic an award of fees for the entire proceeding. Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive. H. R. Rep. No. 94–1558, at 4, n. 7. That purpose does not alter the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success. It simply authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.[10]

In light of the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success, it is clear that plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioners' ultimate success is required.

Besides making a claim under the EHA, petitioners asserted at two different points in the proceedings that procedures employed by state officials denied them due process. They also claimed that Tommy was being discriminated against on the basis of his handicapping condition, in violation of the Equal Protection Clause of the Fourteenth Amendment.

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[10] The legislative history also makes clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success. See S. Rep. No. 94–1011, p. 6 (1976), citing *Davis* v. *County of Los Angeles*, 8 EPD ¶9444 (CD Cal. 1974). See also *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983). The same rule should apply when an unaddressed constitutional claim provides an alternative, but reasonably related, basis for the plaintiff's ultimate relief.

### A

The first due process claim may be disposed of briefly. Petitioners challenged the refusal of the School Committee to grant them a full hearing before terminating Tommy's funding. Petitioners were awarded fees against the School Committee for their efforts in obtaining an injunction to prevent that due process deprivation. The award was not challenged on appeal and we therefore assume that it was proper.

The fact that petitioners prevailed on their initial due process claim, however, by itself does not entitle them to fees for the subsequent administrative and judicial proceedings. The due process claim that entitled petitioners to an order maintaining Tommy's placement throughout the course of the subsequent proceedings is entirely separate from the claims petitioners made in those proceedings. Nor were those proceedings necessitated by the School Committee's failings. Even if the School Committee had complied with state regulations and had guaranteed Tommy's continued placement pending administrative review of its decision, petitioners still would have had to avail themselves of the administrative process in order to obtain the permanent relief they wanted—an interpretation of state law that placed on the School Committee the obligation to pay for Tommy's education. Petitioners' initial due process claim is not sufficiently related to their ultimate success to support an award of fees for the entire proceeding. We turn, therefore, to petitioners' other § 1983 claims.

As petitioners emphasize, their § 1983 claims were not based on alleged violations of the EHA,[11] but on independent claims of constitutional deprivations. As the Court of Appeals recognized, however, petitioners' constitutional claims, a denial of due process and a denial of a free appropriate public education as guaranteed by the Equal Protection Clause, are virtually identical to their EHA claims.[12] The question to be asked, therefore, is whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims.

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[11] Courts generally agree that the EHA may not be claimed as the basis for a § 1983 action. See, *e. g.*, *Quackenbush* v. *Johnson City School District*, 716 F. 2d 141 (CA2 1983); *Department of Education of Hawaii* v. *Katherine D.*, 727 F. 2d 809 (CA9 1983); *Anderson* v. *Thompson*, 658 F. 2d 1205 (CA7 1981).

### B

We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.

In the statement of findings with which the EHA begins, Congress noted that there were more than 8 million handicapped children in the country, the special education needs of most of whom were not being fully met. 20 U. S. C.

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[12] The timing of the filing of petitioners' second amended complaint, after the Supreme Court of Rhode Island had ruled that petitioners were entitled to the relief they sought, reveals that the equal protection claim added nothing to petitioners' claims under the EHA and provides an alternative basis for denying attorney's fees on the basis of that claim. There is, of course, nothing wrong with seeking relief on the basis of certain statutes because those statutes provide for attorney's fees, or with amending a complaint to include claims that provide for attorney's fees. But where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley* v. *Eckerhart*, *supra*, requires that fees not be awarded on the basis of those claims.

§§ 1400(b)(1), (2), and (3). Congress also recognized that in a series of "landmark court cases," the right to an equal education opportunity for handicapped children had been established. S. Rep. No. 94–168, p. 6 (1975). See also *id.*, at 13 ("It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws"). The EHA was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. 20 U. S. C. §§ 1400(b)(8) and (9). At the same time, however, Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States. S. Rep. No. 94–168, at 22. And the Act establishes an enforceable substantive right to a free appropriate public education. See *Board of Education of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176 (1982). See also 121 Cong. Rec. 37417 (1975) (statement of Sen. Schweiker: "It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. [The bill] takes positive necessary steps to insure that the rights of children and their families are protected").[13] Finally, the Act establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S. Rep. No. 94–168, at 11–12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child); *id.*, at 22; *Board of Education of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S., at 208–209.

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[13] Prior to 1975, federal provisions for the education of handicapped children were contained in the EHA, passed in 1970, 84 Stat. 175, and amended in 1974, 88 Stat. 579 (current version at 20 U. S. C. § 1400 *et seq.*). The Act then provided for grants to States to facilitate the development of programs for the education of handicapped children. § 611(a). The only requirements imposed on the States were that they use federal funds on programs designed to meet the special education needs of handicapped children, § 613(a), and that parents or guardians be guaranteed minimum procedural safeguards, including prior notice and an opportunity to be heard when a State proposed to change the educational placement of the child. § 614 (d). See n. 4, *supra*.

In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education.[14] Not only would such a result render superfluous most of the detailed procedural protections outlined in the statute, but, more important, it would also run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

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[14] The District Court in this case relied on similar reasoning—that Congress could not have meant for a plaintiff to be able to circumvent the EHA administrative process—and concluded that a handicapped child asserting an equal protection claim to public education was required to exhaust his administrative remedies before making his § 1983 claim. See *Turillo* v. *Tyson*, 535 F. Supp. 577, 583 (RI 1982), cited in the District Court's oral decision of April 30, 1982, App. to Pet. for Cert. A40. Because exhaustion was required, the court, relying on *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), concluded that attorney's fees were appropriate under § 1988 for work performed in the state administrative process.

The difference between *Carey* and this case is that in *Carey* the statute that authorized fees, Title VII of the Civil Rights Act of 1964, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). If § 1983 stood as an independent avenue of relief for petitioners, then they could go straight to court to assert it.

We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982); *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961). Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy.[15] The crucial consideration is what Congress intended. See *Brown* v. *GSA*, 425 U. S. 820, 825–829 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151, n. 5 (1970).

In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. The legislative history gives no indication that Congress intended such a result.[16] Rather, it indicates that

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[15] There is no issue here of Congress' ability to preclude the federal courts from granting a remedy for a constitutional deprivation. Even if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction. See *Bell* v. *Hood*, 327 U. S. 678, 684 (1946); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 396 (1971); *id.*, at 400–406 (Harlan, J., concurring in judgment).

[16] Petitioners insist that regardless of the wisdom of requiring resort to available EHA remedies before a handicapped child may seek judicial re-

Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

## C

Petitioners also made a due process challenge to the partiality of the state hearing officer. The question whether this claim will support an award of attorney's fees has two aspects—whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983

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view, Congress specifically indicated that it did not intend to limit the judicial remedies otherwise available to a handicapped child. If that were true, we would agree with petitioners that Congress' intent is controlling and that a § 1983 remedy remained available to them. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975). The sentence in the legislative history on which petitioners rely, however, is not the clear expression of congressional intent petitioners would like it to be.

The sentence on which petitioners rely is included in the Committee Report of the Senate's version of the EHA. S. Rep. No. 94–168, pp. 27–28 (1975). The Senate bill included a requirement, not in the Conference bill, see S. Conf. Rep. No. 94–455, pp. 39–40 (1975), that the States set up an entity for ensuring compliance with the EHA. The compliance entity would be authorized, *inter alia*, to receive complaints regarding alleged violations of the Act. The Committee added that it did "not intend the existence of such an entity to limit the right of individuals to seek redress of grievances through other avenues, such as bringing civil action in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." S. Rep. No. 94–168, at 26. In the context in which the statement was made, it appears to establish nothing more than that handicapped children retain a right to judicial review of their individual cases. It does not establish that they can choose whether to avail themselves of the EHA process or go straight to court with an equal protection claim.

on a due process challenge and, if not, whether petitioners are entitled to attorney's fees for their due process claim. We find it unnecessary to resolve the first question, because we are satisfied that even if an independent due process challenge may be maintained, petitioners are not entitled to attorney's fees for their particular claim.[17]

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[17] We note that the issue is not the same as that presented by a substantive equal protection claim to a free appropriate public education. The EHA does set out specific procedural safeguards that must be guaranteed by a State seeking funds under the Act. See 20 U. S. C. § 1415. And although some courts have concluded that the EHA does not authorize injunctive relief to remedy procedural deficiencies, see, *e. g.*, *Hymes* v. *Harnett County Board of Education*, 664 F. 2d 410 (CA4 1981), other courts have construed the district courts' authority under § 1415(e)(2) to grant "appropriate relief" as including the authority to grant injunctive relief, either after an unsuccessful and allegedly unfair administrative proceeding, or prior to exhaustion of the state remedies if pursuing those remedies would be futile or inadequate. See, *e. g.*, *Robert M.* v. *Benton*, 622 F. 2d 370 (CA8 1980); *Monahan* v. *Nebraska*, 491 F. Supp. 1074 (Neb. 1980), aff'd in part and vacated in part, 645 F. 2d 592 (CA8 1981); *Howard S.* v. *Friendswood Independent School District*, 454 F. Supp. 634 (SD Tex. 1978); *Armstrong* v. *Kline*, 476 F. Supp. 583, 601–602 (ED Pa. 1979), remanded on other grounds *sub nom. Battle* v. *Pennsylvania*, 629 F. 2d 269 (CA3 1980), cert. denied, 452 U. S. 968 (1981); *North* v. *District of Columbia Board of Education*, 471 F. Supp. 136 (DC 1979). See also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) ("exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter").

On the other hand, unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme. Under either the EHA or § 1983, a plaintiff would be entitled to bypass the administrative process by obtaining injunctive relief only on a showing that irreparable harm otherwise would result. See *Monahan* v. *Nebraska*, 645 F. 2d, at 598–599. And, while Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the EHA, in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have had to

Petitioners' plea for injunctive relief was not made until after the administrative proceedings had ended. They did not seek an order requiring the Commissioner of Education to grant them a new hearing, but only a declaratory judgment that the state Regulations did not comply with the requirements of due process and the EHA, and an injunction prohibiting the Commissioner from conducting further hearings under those Regulations. App. 59–60. That due process claim and the substantive claim on which petitioners ultimately prevailed involved entirely separate legal theories and, more important, would have warranted entirely different relief. According to their complaint, petitioners did not even seek relief for themselves on the due process claim, but sought only to protect the rights of others coming after them in the administrative process. The efforts petitioners subsequently expended in the judicial process addressed only the substantive question as to which agency, as a matter of state and federal law, was required to pay for Tommy's education. Whether or not the state procedures accorded petitioners the process they were due had no bearing on that substantive question.

We conclude that where, as here, petitioners have presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a nonfee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through § 1983. We note that a contrary conclusion would mean that every EHA plaintiff who seeks judicial review after an adverse agency determination could ensure a fee award for successful judicial efforts simply by including in his substantive challenge a claim that the administrative process was unfair. If the court ignored the due process claim but granted substantive relief, the due process claim could be considered a substantial unaddressed constitutional

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resort to judicial relief to force the agencies to provide them the process they were constitutionally due.

claim and the plaintiff would be entitled to fees.[18] It is unlikely that Congress intended such a result.

## IV

We turn, finally, to petitioners' claim that they were entitled to fees under § 505 of the Rehabilitation Act, because they asserted a substantial claim for relief under § 504 of that Act.

Much of our analysis of petitioners' equal protection claim is applicable here. The EHA is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education. We concluded above that in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education. We also concluded that Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of § 1983. We reach the same conclusion regarding petitioners' § 504 claim. The relationship between the EHA and § 504, however, requires a slightly different analysis from that required by petitioners' equal protection claim.

Section 504 and the EHA are different substantive statutes. While the EHA guarantees a right to a free appropriate public education, § 504 simply prevents discrimination on the basis of handicap. But while the EHA is limited to handicapped children seeking access to public education,

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[18] Even if the court denied the due process claim, as here, it is arguable that the plaintiff would be entitled to have an appellate court determine whether the district court was correct in its ruling on the due process claim. In this case, the District Court ruled against petitioners on their due process claim, and the Court of Appeals determined, on appeal from the District Court's award of substantive relief, that the issue was moot. Nevertheless, in considering the propriety of the District Court's award of fees, the Court of Appeals recognized that the due process claim was at least substantial enough to support federal jurisdiction. 703 F. 2d, at 7.

§ 504 protects handicapped persons of all ages from discrimination in a variety of programs and activities receiving federal financial assistance.

Because both statutes are built around fundamental notions of equal access to state programs and facilities, their substantive requirements, as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar. In regulations promulgated pursuant to § 504, the Secretary of Education[19] has interpreted § 504 as requiring a recipient of federal funds that operates a public elementary or secondary education program to provide a free appropriate public education to each qualified handicapped person in the recipient's jurisdiction. 34 CFR § 104.33(a) (1983).[20] The requirement extends to the provision of a public or private residential placement if necessary to provide a free appropriate public education. § 104.33(c)(3). The regulations also require that the recipient implement procedural safeguards, including notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. § 104.36. The Secretary declined to require the exact EHA procedures, because those procedures might be inappropriate for some recipients not subject to the EHA, see 34

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[19] The regulations were promulgated by the Secretary of Health, Education, and Welfare (HEW). 42 Fed. Reg. 22676 (1977). The functions of the Secretary of HEW under the Rehabilitation Act and under the EHA were transferred in 1979 to the Secretary of Education under the Department of Education Organization Act, § 301(a), 93 Stat. 677, 20 U. S. C. § 3441(a).

[20] Regulations under § 504 and the EHA were being formulated at the same time. The § 504 regulations were effective June 3, 1977. 42 Fed. Reg., at 22676. The EHA regulations were effective October 1, 1977. *Id.*, at 42474. The Secretary of HEW and the Commissioner of Education emphasized the coordination of effort behind the two sets of regulations and the Department's intent that the § 504 regulations be consistent with the requirements of the EHA. See 41 Fed. Reg. 56967 (1976); 42 Fed. Reg., at 22677.

CFR, Subtitle B, ch. 1, App. A, p. 371 (1983), but indicated that compliance with EHA procedures would satisfy § 104.36.

On the other hand, although both statutes begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA.

Section 504, 29 U. S. C. § 794, provides, in pertinent part:

> "No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

In *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979), the Court emphasized that § 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons. 442 U. S., at 411–412. In light of *Davis*, courts construing § 504 as applied to the educational needs of handicapped children have expressed confusion about the extent to which § 504 requires special services necessary to make public education accessible to handicapped children.[21]

In the EHA, on the other hand, Congress specified the affirmative obligations imposed on States to ensure that equal access to a public education is not an empty guarantee, but offers some benefit to a handicapped child. Thus, the statute specifically requires "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education," see *Board of Education* v. *Rowley*, 458 U. S., at 200, including, if the public facilities are inadequate for the needs of the child, "instruction in hospitals and institutions." 20 U. S. C. §§ 1401(16) and (17).

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[21] Courts generally have upheld the § 504 regulations on the grounds that they do not require extensive modification of existing programs and that States and localities generally provide nonhandicapped children with educational services appropriate to their needs. See *Phipps* v. *New Hanover County Board of Education*, 551 F. Supp. 732 (EDNC 1982). But see *Colin K. by John K.* v. *Schmidt*, 715 F. 2d 1, 9 (CA1 1983) (in light of *Davis*, requirement that a school system provide a private residential placement could not be imposed under § 504).

We need not decide the extent of the guarantee of a free appropriate public education Congress intended to impose under § 504. We note the uncertainty regarding the reach of § 504 to emphasize that it is only in the EHA that Congress specified the rights and remedies available to a handicapped child seeking access to public education. Even assuming that the reach of § 504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of § 504.

There is no suggestion that § 504 adds anything to petitioners' substantive right to a free appropriate public education.[22] The only elements added by § 504 are the possibility of circumventing EHA administrative procedures and going straight to court with a § 504 claim,[23] the possibility of a damages award in cases where no such award is available under the EHA,[24] and attorney's fees. As discussed above, Congress' intent to place on local and state educational agencies the responsibility for determining the most appropriate educational plan for a handicapped child is clear. To the extent § 504 otherwise would allow a plaintiff to circumvent that state procedure, we are satisfied that the remedy conflicts with Congress' intent in the EHA.

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[22] Of course, if a State provided services beyond those required by the EHA, but discriminatorily denied those services to a handicapped child, § 504 would remain available to the child as an avenue of relief. In view of the substantial overlap between the two statutes and Congress' intent that efforts to accommodate educational needs be made first on the local level, the presumption in a case involving a claim arguably within the EHA should be that the plaintiff is required to exhaust EHA remedies, unless doing so would be futile.

[23] Lower courts appear to agree, however, that unless doing so would be futile, EHA administrative remedies must be exhausted before a § 504

Congress did not explain the absence of a provision for a damages remedy and attorney's fees in the EHA. Several references in the statute itself and in its legislative history, however, indicate that the omissions were in response to Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children. As noted above, one of the stated purposes of the statute was to relieve this financial burden. See 20 U. S. C. §§ 1400(b)(8) and (9). Discussions of the EHA by its proponents reflect Congress' intent to "make every resource, or as much as possible, available to the direct activities and the direct programs that are going to benefit the handicapped." 121 Cong. Rec. 19501 (1975) (remarks of Sen. Dole). See also *id.*, at 37025 (procedural safeguards designed to further the congressional goal of ensuring full educational opportunity without overburdening the local school districts and state educational agencies) (remarks of

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claim for the same relief available under the EHA may be brought. See, *e. g., Riley* v. *Ambach*, 668 F. 2d 635 (CA2 1981); *Phipps* v. *New Hanover County Board of Education, supra; Harris* v. *Campbell*, 472 F. Supp. 51 (ED Va. 1979); *H. R.* v. *Hornbeck*, 524 F. Supp. 215 (Md. 1981).

[24] There is some confusion among the Circuits as to the availability of a damages remedy under § 504 and under the EHA. Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504, but are available under the EHA only in exceptional circumstances. See, *e. g., Miener* v. *Missouri*, 673 F. 2d 969, 978 (CA8), cert. denied, 459 U. S. 909 (1982); *Anderson* v. *Thompson*, 658 F. 2d 1205 (CA7 1981); *Monahan* v. *Nebraska*, 491 F. Supp., at 1094; *Hurry* v. *Jones*, 560 F. Supp. 500 (RI 1983); *Gregg B.* v. *Board of Education of Lawrence School District*, 535 F. Supp. 1333, 1339–1340 (EDNY 1982).

Rep. Perkins); S. Rep. No. 94–168, at 81 (minority views cognizant of financial burdens on localities). The Act appears to represent Congress' judgment that the best way to ensure a free appropriate public education for handicapped children is to clarify and make enforceable the rights of those children while at the same time endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights. Where § 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise unavailable damages or for an award of attorney's fees.

We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those available under the EHA. We hold only that where, as here, whatever remedy might be provided under § 504 is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to § 504.

In light of our conclusion that § 504 was not available to petitioners as an alternative basis for the relief they sought, we need not decide whether, as petitioners urge, § 505 authorizes attorney's fees for substantial, unaddressed § 504 claims or whether a Rehabilitation Act claim is entitled only to a "determination on the . . . claim for the purpose of awarding counsel fees." H. R. Rep. No. 94–1558, at 4, n. 7.

## V

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

In this case we are called upon to analyze the interaction among five statutory provisions: § 1 of the Civil Rights Act of

1871, as amended, 42 U. S. C. § 1983; § 2 of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988; § 504 of the Rehabilitation Act of 1973, as amended, 29 U. S. C. § 794; § 505(b) of the Rehabilitation Act, 29 U. S. C. § 794a(b); and § 615(e)(2) of the Education of the Handicapped Act (EHA or Act), as added, 89 Stat. 789, 20 U. S. C. § 1415(e)(2).

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any rights, privileges, or immunities secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

And § 1988 provides that the prevailing party in an action prosecuted under § 1983 may be awarded reasonable attorney's fees. Similarly, §§ 504 and 505(b) of the Rehabilitation Act provide a cause of action and attorney's fees, respectively, to an individual who, "solely by reason of his handicap," has been "excluded from the participation in, . . . denied the benefits of, . . . [or] subjected to discrimination under any program or activity receiving Federal financial assistance." Finally, § 615(e)(2) of the EHA authorizes judicial review of the States' provision of "free appropriate public education" to handicapped children. Unlike 42 U. S. C. § 1983 and § 504 of the Rehabilitation Act, however, § 615(e)(2) has no counterpart in the EHA authorizing the award of attorney's fees to prevailing parties.

Petitioners challenge Rhode Island's discriminatory failure to afford Thomas F. Smith III access to certain educational programs made available to other handicapped children. As the Court recognizes, *ante*, at 1006, 1007, 1008–1009, this challenge states a meritorious claim under the EHA and a substantial claim under the Equal Protection Clause of the Fourteenth Amendment. In addition, petitioners' claim appears to fall squarely within the terms of § 504 of the Rehabilitation Act. Consequently, if §§ 504 and 1983 are available as bases for petitioners' action, petitioners are entitled to recover reasonable attorney's fees under § 1988 and, at a minimum, to be given an opportunity to establish the meritoriousness of their § 504 claim. *Maher* v. *Gagne*, 448 U. S. 122 (1980); H. R. Rep. No. 94–1558, p. 4, n. 7 (1976); Brief for Petitioners 61–62, n. 26 (legislative history establishes that § 505(b) incorporates standards governing § 1988).[1]

To determine whether § 504 or § 1983 is available, each provision must be read together with the EHA.[2] As the Court demonstrates, in enacting the EHA, Congress surely intended that individuals with claims covered by that Act would pursue relief through the administrative channels that the Act established before seeking redress in court. See *ante*, at 1009–1013, 1016–1019. It would make little sense for Congress to have established such a detailed and comprehensive administrative system and yet allow individuals to bypass the system, at their option, by bringing suits directly to the courts under either § 504 or § 1983. To that extent, therefore, the statutes before us are in conflict with one another. Accordingly, our guide must be the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes. *Watt* v. *Alaska*, 451 U. S. 259, 267 (1981); *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). We must, therefore, construe the statutory provisions at issue here so as to promote the congressional intent underlying the EHA, which was enacted after §§ 504 and 1983 and which is addressed specifically to the problems facing handicapped schoolchildren. At the same time, however, we must preserve those aspects of §§ 504 and 1983 that are not in irreconcilable conflict with the EHA.

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[1] The Court holds that petitioners may not recover any fees for this lawsuit. That result is wrong, I believe, without regard to whether § 505(b) requires an unlitigated § 504 claim to be meritorious or merely "substantial." Even if petitioners must establish the meritoriousness, and not just the substantiality, of their unlitigated § 504 claim, affirmance of the Court of Appeals' judgment would be improper, for petitioners have been given no opportunity to establish that their § 504 claim has merit and because petitioners are entitled to fees under § 1988. Since I think petitioners are entitled to fees under § 1988, and since even my dissent from the Court's holding on § 505(b) does not depend on whether the substantiality standard applies to unlitigated § 504 claims, I do not address that question.

I also need not consider what effect petitioners' due process claim against respondents, *ante*, at 1013–1016, may have on petitioners' entitlement to fees. I dissent from the Court's holding because I believe that petitioners are entitled to fees under § 1988 and may be entitled to fees under § 505(b) of the Rehabilitation Act. Petitioners' due process claim might have a bearing on the amount of fees they should recover, but it does not deprive petitioners of all entitlement to a fee award.

[2] Some claims covered by the EHA are also grounded in the Constitution and hence could be pursued under § 1983. Others are nonconstitutional claims cognizable under § 504. Still others are nonconstitutional claims cognizable only under the EHA. This case is concerned only with claims that have as a substantive basis both the EHA and either the Constitution or § 504.

The natural resolution of the conflict between the EHA, on the one hand, and §§ 504 and 1983, on the other, is to require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under § 504 or § 1983. Under this resolution, the integrity of the EHA is preserved entirely, and yet §§ 504 and 1983 are also preserved to the extent that they do not undermine the EHA. Although the primary function of §§ 504 and 1983 is to provide direct access to the courts for certain types of claims, these provisions also operate, as this case demonstrates, to identify those types of causes of action for which Congress has authorized the award of attorney's fees to prevailing parties. Significantly, this function does not in any way conflict with the goals or operation of the EHA. There is no basis, therefore, for concluding that either § 504 or § 1983 is unavailable for this limited purpose.

The Court, however, has responded to the conflict among these statutes by restricting the applicability of §§ 504 and 1983 far more than is necessary to resolve their inconsistency. Indeed, the Court holds that both §§ 504 and 1983 are wholly unavailable to individuals seeking to secure their rights to a free appropriate public education, despite the fact that the terms and intent of Congress in enacting each of these provisions unquestionably extend to many of those claims. As a result, the Court finds that attorney's fees, which would otherwise be available to those individuals under §§ 505(b) and 1988, are now unavailable. Yet the Court recognizes that there is absolutely no indication in the language of the EHA or in the Act's legislative history that Congress meant to effect such a repeal, let alone any indication that Congress specifically intended to bar the recovery of attorney's fees for parties that prevail in this type of action. The Court's rationale for effectively repealing §§ 504, 505(b), 1983, and 1988 to the extent that they cover petitioners' claim is that the comprehensiveness and detail with which the EHA addresses the problem of providing schooling to handicapped children implies that Congress intended to repeal all other remedies that overlap with the EHA, even if they do not conflict with the EHA.[3]

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[3] The Court at one point seems to indicate that Congress actually considered the question of withholding attorney's fees from prevailing parties in actions covered by the EHA. *Ante*, at 1020–1021. But at the time the EHA was enacted, neither § 505(b) of the Rehabilitation Act nor § 1988 had yet been enacted. In that context, congressional silence on the question of attorney's fees can only be interpreted to indicate that Congress did not consider the matter. Thus, this claim is particularly unpersuasive and, in fact, does not appear to constitute a significant basis of the Court's decision.

Repeals by implication, however, are strongly disfavored. *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 788 (1981); *Morton* v. *Mancari*, *supra*, at 550; *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). And, as stated above, they are tolerated only to the extent necessary to resolve clear repugnancy between statutes. *Radzanower* v. *Touche Ross & Co.*, *supra*, at 154; *Posadas* v. *National City Bank*, *supra*, at 503. The function that §§ 504 and 1983 perform of identifying those claims for which attorney's fees are authorized under §§ 505(b) and 1988 is not repugnant to the EHA. The Court therefore has erred in concluding that petitioners cannot obtain attorney's fees.

In cases like this, it is particularly important that the Court exercise restraint in concluding that one Act of Congress implicitly repeals another, not only to avoid misconstruction of the law effecting the putative repeal, but also to preserve the intent of later Congresses that have already enacted laws that are dependent on the continued applicability of the law whose implicit repeal is in question. By failing to exercise such restraint here, and hence concluding that the EHA implicitly repealed, in part, §§ 504 and 1983, the Court has not only misconstrued the congressional intent underlying the EHA, it has also frustrated Congress' intent in enacting §§ 505(b) and 1988—each of which was enacted after the EHA and premised on a view of §§ 504 and 1983 that was significantly more expansive than that offered by the Court today. Although in enacting the EHA, Congress was silent with respect to the continued availability of §§ 504 and 1983 for claims that could be brought directly under the EHA, there can be no doubt that, at the time §§ 505(b) and 1988 were passed, Congress believed that the EHA had not eliminated these alternative remedies. Congressional understanding at these later points certainly sheds light on Congress' earlier intent in enacting the EHA, but perhaps more importantly, it demonstrates the extent to which the Court's finding of an implicit repeal has undermined the congressional intent behind the enactment of §§ 505(b) and 1988.

The Department of Health, Education, and Welfare (HEW) promulgated regulations under § 504 of the Rehabilitation Act *after* the EHA was passed. Those regulations contained a lengthy subpart governing the provision of education to the handicapped stating: "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 42 Fed. Reg. 22676, 22682 (1977). Thus, the Department charged with enforcing the Rehabilitation Act and the EHA did not understand the latter to repeal the former with respect to handicapped education.[4] And, of course, the interpretation of the Act by the agency responsible for its enforcement is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971). Furthermore, Congress was very much aware of HEW's interpretation of the two Acts. During oversight hearings on the Rehabilitation Act, held after the enactment of the EHA, representatives of HEW testified that the agency had recently promulgated regulations under § 504 and that those regulations addressed discrimination in the provision of education to handicapped children.[5] Hearings on Implementation of Section 504, Rehabilitation Act of 1973, before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., 296–297 (1977) (statement of David Tatel, Director,

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[4] As the Court notes, *ante*, at 1017, n. 20, the regulations promulgated under § 504 and the EHA were closely coordinated with one another. See 42 Fed. Reg. 22677 (1977).

[5] In addition, testimony was generally taken on the success of § 504 as applied to discrimination against handicapped children in the provision of publicly funded education. See, *e. g.*, Hearings on Implementation of Section 504, Rehabilitation Act of 1973, before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., 263–265 (1977) (statement of Daniel Yohalem, Children's Defense Fund); *id.*, at 278–285 (statement of Edward E. Corbett, Jr., Maryland School for the Deaf).

Office for Civil Rights, Department of Health, Education, and Welfare);[6] Hearings on the Rehabilitation of the Handicapped Programs, 1976, before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., 1498, 1499, 1508, 1539–1546 (1976) (statement of Martin H. Gerry, Director, Office for Civil Rights, Department of Health, Education, and Welfare). No member of the House or Senate Subcommittee raised any question regarding § 504's continued coverage of discrimination in education after the passage of the EHA.

Indeed, the Senate Report accompanying the bill that included § 505(b) of the Rehabilitation Act explicitly referred to, and approved, the regulations promulgated under § 504. The Report then went on to address the need for attorney's fees, referring to the rights that § 504 extended to handicapped individuals generally and intimating no exception for handicapped children seeking education. S. Rep. No. 95–890, pp. 19–20 (1978).

Similarly, the House Report stated:

> "The proposed amendment is not in any way unique. At present there are at least 90 separate attorney's fees provisions to promote enforcement of over 90 different

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[6] Mr. Tatel's testimony included the following:

"With regard to preschool, elementary, and secondary education institutions, the regulations require:

"—annual identification and location of unserved hadicapped children;

"—free appropriate public education to each qualified handicapped child regardless of the nature or severity of the handicap (including coverage of nonmedical care, room and board where residential placement required);

"—education of handicapped students to maximum extent possible;

"—comparability of facilities (including services and activities provided therein) identifiable as being for handicapped persons;

"—evaluation requirements to insure proper classification and placement of handicapped children and procedural safeguards;

"—equal opportunity for participation of handicapped students in nonacademic and extracurricular services and activities." *Id.*, at 296.

> Federal laws. In fact, disabled individuals are one of the very few minority groups in this country who have not been authorized by the Congress to seek attorney's fees. The amendment proposes to correct this omission and thereby assist handicapped individuals in securing the legal protection guaranteed them under title V of the Act." H. R. Rep. No. 95–1149, p. 21 (1978).

Neither the terms nor the logic of this statement admits of the possibility that Congress intended to exclude from the coverage of § 505(b) the claims of handicapped children seeking a free appropriate public education.

Finally, although Congress, in enacting § 1988, did not specifically refer to the applicability of § 1983 to constitutional claims by handicapped children seeking education, it clearly intended to authorize attorney's fees in all cases involving the deprivation of civil rights. Adopted in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), § 1988 was intended to close "anomalous gaps in our civil rights laws whereby awards of fees are . . . unavailable." S. Rep. No. 94–1011, p. 4 (1976). The Senate Report thus stated:

> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.
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> . . . . .
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> "'Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but an empty gesture . . . .' *Hall*

> v. *Cole*, 412 U. S. 1 (1973), quoting 462 F. 2d 777, 780–81 (2d Cir. 1972).
>
> "The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven." *Id.*, at 2–3.

It would be anomalous, to say the least, for Congress to have passed a provision as broad as § 1988, and to provide an equally broad explanation, and yet to leave a "gap" in its own coverage of the constitutional claims of handicapped children seeking a free appropriate public education.[7] See also H. R. Rep. No. 94–1558, pp. 4–5 (1976).

In sum, the Court's conclusion that the EHA repealed the availability of §§ 504 and 1983 to individuals seeking a free appropriate public education runs counter to well-established principles of statutory interpretation. It finds no support in the terms or legislative history of the EHA. And, most importantly, it undermines the intent of Congress in enacting both §§ 505(b) and 1988. Had this case arisen prior to the enactment of §§ 505(b) and 1988, Congress could have taken account of the Court's expansive interpretation of the EHA. Presumably, it would have either clarified the applicability of §§ 504 and 1983 to claims for a free appropriate public education, or it would have extended the coverage of §§ 505(b) and 1988 to certain claims brought under the EHA. But with today's decision coming as it does after Congress has spoken on the subject of attorney's fees, Congress will now have to take the time to revisit the matter. And until it does, the handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs. It is at best ironic that the Court has managed to impose this burden on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children.

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[7] Moreover, Congress was fully aware of the possibility that the same claim in the civil rights area might have duplicative statutory remedies. For instance, one of the "gaps" that Congress sought to close in enacting § 1988 was the possibility that an individual could bring an employment discrimination suit under Title VII of the 1964 Civil Rights Act and receive attorney's fees, although another individual bringing the same suit under 42 U. S. C. § 1981 could not recover attorney's fees. S. Rep. No. 94–1011, p. 4 (1976). Congress' response to this situation was to ensure that attorney's fees would be available under either provision.

# IMMIGRATION AND NATURALIZATION SERVICE *v.* LOPEZ-MENDOZA ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–491. Argued April 18, 1984—Decided July 5, 1984

Respondent Mexican citizens were ordered deported by an Immigration Judge. Respondent Lopez-Mendoza unsuccessfully objected to being summoned to the deportation hearing following his allegedly unlawful arrest by an Immigration and Naturalization Service (INS) agent, but he did not object to the receipt in evidence of his admission, after the arrest, of illegal entry into this country. Respondent Sandoval-Sanchez, who also admitted his illegal entry after being arrested by an INS agent, unsuccessfully objected to the evidence of his admission offered at the deportation proceeding, contending that it should have been suppressed as the fruit of an unlawful arrest. The Board of Immigration Appeals (BIA) affirmed the deportation orders. The Court of Appeals reversed respondent Sandoval-Sanchez' deportation order, holding that his detention by INS agents violated the Fourth Amendment, that his admission of illegal entry was the product of this detention, and that the exclusionary rule barred its use in a deportation proceeding. The court vacated respondent Lopez-Mendoza's deportation order and remanded his case to the BIA to determine whether the Fourth Amendment had been violated in the course of his arrest.

*Held:*

1. A deportation proceeding is a purely civil action to determine a person's eligibility to remain in this country. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws. Consistent with the civil nature of a deportation proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing. Pp. 1038–1039.

2. The "body" or identity of a defendant in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. On this basis alone, the Court of Appeals' decision as to respondent Lopez-Mendoza must be reversed, since he objected only to being summoned to his deportation hearing after an allegedly unlawful arrest and did not object to the evidence offered against him. The mere fact of an illegal arrest has no bearing on a subsequent deportation hearing. Pp. 1039–1040.

3. The exclusionary rule does not apply in a deportation proceeding; hence, the rule does not apply so as to require that respondent Sandoval-Sanchez' admission of illegal entry after his allegedly unlawful arrest be excluded from evidence at his deportation hearing. Under the balancing test applied in *United States* v. *Janis*, 428 U. S. 433, whereby the likely social benefits of excluding unlawfully obtained evidence are weighed against the likely costs, the balance comes out against applying the exclusionary rule in civil deportation proceedings. Several factors significantly reduce the likely deterrent value of the rule in such proceedings. First, regardless of how the arrest of an illegal alien is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation. Second, based on statistics indicating that over 97.7 percent of illegal aliens agree to voluntary deportation without a formal hearing, every INS agent knows that it is unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation hearing. Third, the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its agents. And finally, the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for INS practices that might violate Fourth Amendment rights. As to the social costs of applying the exclusionary rule in deportation proceedings, they would be high. In particular, the application of the rule in cases such as respondent Sandoval-Sanchez' would compel the courts to release from custody persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country, and would unduly complicate the INS's deliberately simple deportation hearing system. Pp. 1040–1050.

705 F. 2d 1059, reversed.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part V, in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *post*, p. 1051, WHITE, J., *post*, p. 1052, MARSHALL, J., *post*, p. 1060, and STEVENS, J., *post*, p. 1061, filed dissenting opinions.

*Deputy Solicitor General Frey* argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Kathryn A. Oberly*, *Barbara L. Herwig*, *Marshall Tamor Golding*, and *Howard S. Scher*.

*Mary L. Heen* argued the cause for respondents. With her on the brief were *Burt Neuborne*, *Charles S. Sims*, *John E. Huerta*, *Joaquin G. Avila*, *Morris J. Baller*, and *Charles H. Barr*.

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, and an opinion with respect to Part V, in which JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST joined.*

This litigation requires us to decide whether an admission of unlawful presence in this country made subsequently to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing. We hold that the exclusionary rule need not be applied in such a proceeding.

## I

Respondents Adan Lopez-Mendoza and Elias Sandoval-Sanchez, both citizens of Mexico, were summoned to separate deportation proceedings in California and Washington, and both were ordered deported. They challenged the regularity of those proceedings on grounds related to the lawfulness of their respective arrests by officials of the Immigration and Naturalization Service (INS). On administrative appeal the Board of Immigration Appeals (BIA), an agency of the Department of Justice, affirmed the deportation orders.

The Court of Appeals for the Ninth Circuit, sitting en banc, reversed Sandoval-Sanchez' deportation order and vacated and remanded Lopez-Mendoza's deportation order. 705 F. 2d 1059 (1983). It ruled that Sandoval-Sanchez' admission of his illegal presence in this country was the fruit of an unlawful arrest, and that the exclusionary rule applied in a deportation proceeding. Lopez-Mendoza's deportation order was vacated and his case remanded to the BIA to determine whether the Fourth Amendment had been violated in the course of his arrest. We granted certiorari, 464 U. S. 1037 (1984).

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*THE CHIEF JUSTICE joins all but Part V of this opinion.

### A

Respondent Lopez-Mendoza was arrested in 1976 by INS agents at his place of employment, a transmission repair shop in San Mateo, Cal. Responding to a tip, INS investigators arrived at the shop shortly before 8 a. m. The agents had not sought a warrant to search the premises or to arrest any of its occupants. The proprietor of the shop firmly refused to allow the agents to interview his employees during working hours. Nevertheless, while one agent engaged the proprietor in conversation another entered the shop and approached Lopez-Mendoza. In response to the agent's questioning, Lopez-Mendoza gave his name and indicated that he was from Mexico with no close family ties in the United States. The agent then placed him under arrest. Lopez-Mendoza underwent further questioning at INS offices, where he admitted he was born in Mexico, was still a citizen of Mexico, and had entered this country without inspection by immigration authorities. Based on his answers, the agents prepared a "Record of Deportable Alien" (Form I–213), and an affidavit which Lopez-Mendoza executed, admitting his Mexican nationality and his illegal entry into this country.

A hearing was held before an Immigration Judge. Lopez-Mendoza's counsel moved to terminate the proceeding on the ground that Lopez-Mendoza had been arrested illegally. The judge ruled that the legality of the arrest was not relevant to the deportation proceeding and therefore declined to rule on the legality of Lopez-Mendoza's arrest. *Matter of Lopez-Mendoza*, No. A22 452 208 (INS, Dec. 21, 1977), reprinted in App. to Pet. for Cert. 97a. The Form I–213 and the affidavit executed by Lopez-Mendoza were received into evidence without objection from Lopez-Mendoza. On the basis of this evidence the Immigration Judge found Lopez-

Mendoza deportable. Lopez-Mendoza was granted the option of voluntary departure.

The BIA dismissed Lopez-Mendoza's appeal. It noted that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding," *In re Lopez-Mendoza*, No. A22 452 208 (BIA, Sept. 19, 1979), reprinted in App. to Pet. for Cert. 100a, 102a, and observed that Lopez-Mendoza had not objected to the admission into evidence of Form I–213 and the affidavit he had executed. *Id.*, at 103a. The BIA also noted that the exclusionary rule is not applied to redress the injury to the privacy of the search victim, and that the BIA had previously concluded that application of the rule in deportation proceedings to deter unlawful INS conduct was inappropriate. *Matter of Sandoval*, 17 I. & N. Dec. 70 (BIA 1979).

The Court of Appeals vacated the order of deportation and remanded for a determination whether Lopez-Mendoza's Fourth Amendment rights had been violated when he was arrested.

## B

Respondent Sandoval-Sanchez (who is not the same individual who was involved in *Matter of Sandoval*, *supra*) was arrested in 1977 at his place of employment, a potato processing plant in Pasco, Wash. INS Agent Bower and other officers went to the plant, with the permission of its personnel manager, to check for illegal aliens. During a change in shift, officers stationed themselves at the exits while Bower and a uniformed Border Patrol agent entered the plant. They went to the lunchroom and identified themselves as immigration officers. Many people in the room rose and headed for the exits or milled around; others in the plant left their equipment and started running; still others who were entering the plant turned around and started walking back out. The two officers eventually stationed themselves at the main entrance to the plant and looked for passing employees who averted their heads, avoided eye contact, or tried to hide themselves in a group. Those individuals were addressed with innocuous questions in English. Any who could not respond in English and who otherwise aroused Agent Bower's suspicions were questioned in Spanish as to their right to be in the United States.

Respondent Sandoval-Sanchez was in a line of workers entering the plant. Sandoval-Sanchez testified that he did not realize that immigration officers were checking people entering the plant, but that he did see standing at the plant entrance a man in uniform who appeared to be a police officer. Agent Bower testified that it was probable that he, not his partner, had questioned Sandoval-Sanchez at the plant, but that he could not be absolutely positive. The employee he thought he remembered as Sandoval-Sanchez had been "very evasive," had averted his head, turned around, and walked away when he saw Agent Bower. App. 137, 138. Bower was certain that no one was questioned about his status unless his actions had given the agents reason to believe that he was an undocumented alien.

Thirty-seven employees, including Sandoval-Sanchez, were briefly detained at the plant and then taken to the county jail. About one-third immediately availed themselves of the option of voluntary departure and were put on a bus to Mexico. Sandoval-Sanchez exercised his right to a deportation hearing. Sandoval-Sanchez was then questioned further, and Agent Bower recorded Sandoval-Sanchez' admission of unlawful entry. Sandoval-Sanchez contends he was not aware that he had a right to remain silent.

At his deportation hearing Sandoval-Sanchez contended that the evidence offered by the INS should be suppressed as the fruit of an unlawful arrest. The Immigration Judge considered and rejected Sandoval-Sanchez' claim that he had been illegally arrested, but ruled in the alternative that the legality of the arrest was not relevant to the deportation hearing. *Matter of Sandoval-Sanchez*, No. A22 346 925

(INS, Oct. 7, 1977), reprinted in App. to Pet. for Cert. 104a. Based on the written record of Sandoval-Sanchez' admissions the Immigration Judge found him deportable and granted him voluntary departure. The BIA dismissed Sandoval-Sanchez' appeal. *In re Sandoval-Sanchez*, No. A22 346 925 (BIA, Feb. 21, 1980). It concluded that the circumstances of the arrest had not affected the voluntariness of his recorded admission, and again declined to invoke the exclusionary rule, relying on its earlier decision in *Matter of Sandoval*, *supra*.

On appeal the Court of Appeals concluded that Sandoval-Sanchez' detention by the immigration officers violated the Fourth Amendment, that the statements he made were a product of that detention, and that the exclusionary rule barred their use in a deportation hearing. The deportation order against Sandoval-Sanchez was accordingly reversed.

## II

A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. 8 U. S. C. §§ 1302, 1306, 1325. The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain. See 8 U. S. C. §§ 1251, 1252(b); *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (1913); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 (1893).

A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing. The respondent must be given "a reasonable opportunity to be present at [the] proceeding," but if the respondent fails to avail himself of that opportunity the hearing may proceed in his absence. 8 U. S. C. § 1252(b). In many deportation cases the INS must show only identity and alienage; the burden then shifts to the respondent to prove the time, place, and manner of his entry. See 8 U. S. C. § 1361; *Matter of Sandoval*, 17 I. & N. Dec. 70 (BIA 1979). A decision of deportability need be based only on "reasonable, substantial, and probative evidence," 8 U. S. C. § 1252(b)(4). The BIA for its part has required only "clear, unequivocal and convincing" evidence of the respondent's deportability, not proof beyond a reasonable doubt. 8 CFR § 242.14(a) (1984). The Courts of Appeals have held, for example that the absence of *Miranda* warnings does not render an otherwise voluntary statement by the respondent inadmissible in a deportation case. *Navia-Duran* v. *INS*, 568 F. 2d 803, 808 (CA1 1977); *Avila-Gallegos* v. *INS*, 525 F. 2d 666, 667 (CA2 1975); *Chavez-Raya* v. *INS*, 519 F. 2d 397, 399–401 (CA7 1975). See also *Abel* v. *United States*, 362 U. S. 217, 236–237 (1960) (search permitted incidental to an arrest pursuant to an administrative warrant issued by the INS); *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) (*Ex Post Facto* Clause has no application to deportation); *Carlson* v. *Landon*, 342 U. S. 524, 544–546 (1952) (Eighth Amendment does not require bail to be granted in certain deportation cases); *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 157 (1923) (involuntary confessions admissible at deportation hearing). In short, a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.

## III

The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See *Ger-*

*stein* v. *Pugh*, 420 U. S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U. S. 519, 522 (1952); *United States ex rel. Bilokumsky* v. *Tod*, *supra*, at 158. A similar rule applies in forfeiture proceedings directed against contraband or forfeitable property. See, *e. g.*, *United States* v. *Eighty-Eight Thousand, Five Hundred Dollars*, 671 F. 2d 293 (CA8 1982); *United States* v. *One (1) 1971 Harley-Davidson Motorcycle*, 508 F. 2d 351 (CA9 1974); *United States* v. *One 1965 Buick*, 397 F. 2d 782 (CA6 1968).

On this basis alone the Court of Appeals' decision as to respondent Lopez-Mendoza must be reversed. At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him. The BIA correctly ruled that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding."[1] *In re Lopez-Mendoza*, No. A22 452 208 (BIA, Sept. 19, 1979), reprinted in App. to Pet. for Cert. 102a.

## IV

Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding. The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated. *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The reach of the exclusionary rule beyond the context of a criminal prosecution, however, is less clear. Although this Court has once stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings," *United States ex rel. Bilokumsky* v. *Tod, supra*, at 155, the Court has never squarely addressed the question before. Lower court decisions dealing with this question are sparse.[2]

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[1] The Court of Appeals brushed over Lopez-Mendoza's failure to object to the evidence in an apparently unsettled footnote of its decision. The Court of Appeals was initially of the view that a motion to terminate a proceeding on the ground that the arrest of the respondent was unlawful is, "for all practical purposes," the same as a motion to suppress evidence as the fruit of an unlawful arrest. Slip opinion, at 1765, n. 1 (Apr. 25, 1983). In the bound report of its opinion, however, the Court of Appeals takes a somewhat different view, stating in a revised version of the same footnote that "the only reasonable way to interpret the motion to terminate is as one that includes both a motion to suppress and a motion to dismiss." 705 F. 2d 1059, 1060, n. 1 (1983).

In *United States* v. *Janis*, 428 U. S. 433 (1976), this Court set forth a framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. Imprecise as the exercise may be, the Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.'" *Id.*, at 446, quoting *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

At stake in *Janis* was application of the exclusionary rule in a federal civil tax assessment proceeding following the unlawful seizure of evidence by state, not federal, officials. The Court noted at the outset that "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." 428 U. S., at 447 (footnote omitted). Two factors in *Janis* suggested that the deterrence value of the exclusionary rule in the context of that case was slight. First, the state law enforcement officials were already "punished" by the exclusion of the evidence in the state criminal trial as a result of the same conduct. *Id.*, at 448. Second, the evidence was also excludable in any federal criminal trial that might be held. Both factors suggested that further application of the exclusionary rule in the federal civil proceeding would contribute little more to the deterrence of unlawful conduct by state officials. On the cost side of the balance, *Janis* focused simply on the loss of "concededly relevant and reliable evidence." *Id.*, at 447. The Court concluded that, on balance, this cost outweighed the likely social benefits achievable through application of the exclusionary rule in the federal civil proceeding.

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[2] In *United States* v. *Wong Quong Wong*, 94 F. 832 (Vt. 1899), a District Judge excluded letters seized from the appellant in a civil deportation proceeding. In *Ex parte Jackson*, 263 F. 110 (Mont.), appeal dism'd *sub nom. Andrews* v. *Jackson*, 267 F. 1022 (CA9 1920), another District Judge granted habeas corpus relief on the ground that papers and pamphlets used against the habeas petitioner in a deportation proceeding had been unlawfully seized. *Wong Chung Che* v. *INS*, 565 F. 2d 166 (CA1 1977), held that papers obtained by INS agents in an unlawful search are inadmissible in deportation proceedings.

While it seems likely that the deterrence value of applying the exclusionary rule in deportation proceedings would be higher than it was in *Janis*, it is also quite clear that the social costs would be very much greater as well. Applying the *Janis* balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding, we therefore reach the same conclusion as in *Janis*.

The likely deterrence value of the exclusionary rule in deportation proceedings is difficult to assess. On the one hand, a civil deportation proceeding is a civil complement to a possible criminal prosecution, and to this extent it resembles the civil proceeding under review in *Janis*. The INS does not suggest that the exclusionary rule should not continue to apply in criminal proceedings against an alien who unlawfully enters or remains in this country, and the prospect of losing evidence that might otherwise be used in a criminal prosecution undoubtedly supplies some residual deterrent to unlawful conduct by INS officials. But it must be acknowledged that only a very small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions. Thus the arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding. Moreover, here, in contrast to *Janis*, the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action. As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such "intrasovereign" violations.

Nonetheless, several other factors significantly reduce the likely deterrent value of the exclusionary rule in a civil deportation proceeding. First, regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation. As the BIA has recognized, in many deportation proceedings "the sole matters necessary for the Government to establish are the respondent's identity and alienage—at which point the burden shifts to the respondent to prove the time, place and manner of entry." *Matter of Sandoval*, 17 I. & N. Dec., at 79. Since the person and identity of the respondent are not themselves suppressible, see *supra*, at 1039–1040, the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest. See *Matter of Sandoval*, *supra*, at 79; see, *e. g.*, *Avila-Gallegos* v. *INS*, 525 F. 2d 666 (CA2 1975). The INS's task is simplified in this regard by the civil nature of the proceeding. As Justice Brandeis stated: "Silence is often evidence of the most persuasive character. . . . [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. . . . A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute." *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S., at 153–154.

The second factor is a practical one. In the course of a year the average INS agent arrests almost 500 illegal aliens. Brief for Petitioner 38. Over 97.5% apparently agree to voluntary deportation without a formal hearing. 705 F. 2d, at 1071, n. 17. Among the remainder who do request a formal hearing (apparently a dozen or so in all, per officer, per year) very few challenge the circumstances of their arrests. As noted by the Court of Appeals, "the BIA was able to find only two reported immigration cases since 1899 in which the [exclusionary] rule was applied to bar unlawfully seized evidence, only one other case in which the rule's application was specifically addressed, and fewer than fifty BIA proceedings since 1952 in which a Fourth Amendment challenge to the introduction of evidence was even raised." *Id.*, at 1071. Every INS agent knows, therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding. When an occasional challenge is brought, the consequences from the point of view of the officer's overall arrest and deportation record will be trivial. In these circumstances, the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.

Third, and perhaps most important, the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers. Most arrests of illegal aliens away from the border occur during farm, factory, or other workplace surveys. Large numbers of illegal aliens are often arrested at one time, and conditions are understandably chaotic. See Brief for Petitioner in *INS* v. *Delgado*, O. T. 1983, No. 82–1271, pp. 3–5. To safeguard the rights of those who are lawfully present at inspected workplaces the INS has developed rules restricting stop, interrogation, and arrest practices. *Id.*, at 7, n. 7, 32–40, and n. 25. These regulations require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof. New immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law. Brief for Petitioner 39–40. Evidence seized through intentionally unlawful conduct is excluded by Department of Justice policy from the proceeding for which it was obtained. See Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, Violations of Search and Seizure Law (Jan. 16, 1981). The INS also has in place a procedure for investigating and punishing immigration officers who commit Fourth Amendment violations. See Office of General Counsel, INS, U. S. Dept. of Justice, The Law of Arrest, Search, and Seizure for Immigration Officers 35 (Jan. 1983). The INS's attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, but it does reduce the likely deterrent value of the exclusionary rule. Deterrence must be measured at the margin.

Finally, the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights. The INS is a single agency, under central federal control, and engaged in operations of broad scope but highly repetitive character. The possibility of declaratory relief against the agency thus offers a means for challenging the validity of INS practices, when standing requirements for bringing such an action can be met. Cf. *INS* v. *Delgado*, 466 U. S. 210 (1984).

Respondents contend that retention of the exclusionary rule is necessary to safeguard the Fourth Amendment rights of ethnic Americans, particularly the Hispanic-Americans lawfully in this country. We recognize that respondents raise here legitimate and important concerns. But application of the exclusionary rule to civil deportation proceedings can be justified only if the rule is likely to add significant protection to these Fourth Amendment rights. The exclusionary rule provides no remedy for completed wrongs; those lawfully in this country can be interested in its application only insofar as it may serve as an effective deterrent to future INS misconduct. For the reasons we have discussed we conclude that application of the rule in INS civil deportation proceedings, as in the circumstances discussed in *Janis*, "is unlikely to provide significant, much less substantial, additional deterrence." 428 U. S., at 458. Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.

On the other side of the scale, the social costs of applying the exclusionary rule in deportation proceedings are both unusual and significant. The first cost is one that is unique to continuing violations of the law. Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary rule.

Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized. On the rare occasions that it has considered costs of this type the Court has firmly indicated that the exclusionary rule does not extend this far. See *United States* v. *Jeffers*, 342 U. S. 48, 54 (1951); *Trupiano* v. *United States*, 334 U. S. 699, 710 (1948). The rationale for these holdings is not difficult to find. "Both *Trupiano* and *Jeffers* concerned objects the possession of which, without more, constitutes a crime. The re-possession of such *per se* contraband by Jeffers and Trupiano would have subjected them to criminal penalties. The return of the contraband would clearly have frustrated the express public policy against the possession of such objects." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 699 (1965) (footnote omitted). Precisely the same can be said here. Sandoval-Sanchez is a person whose unregistered presence in this country, without more, constitutes a crime.[3] His release within our borders would immediately subject him to criminal penalties. His release would clearly frustrate the express public policy against an alien's unregistered presence in this country. Even the objective of deterring Fourth Amendment violations should not require such a result. The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[4]

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[3] Sandoval-Sanchez was arrested on June 23, 1977. His deportation hearing was held on October 7, 1977. By that time he was under a duty to apply for registration as an alien. A failure to do so plainly constituted a continuing crime. 8 U. S. C. §§ 1302, 1306. Sandoval-Sanchez was not, of course, prosecuted for this crime, and we do not know whether or not he did make the required application. But it is safe to assume that the exclusionary rule would never be at issue in a deportation proceeding brought against an alien who entered the country unlawfully and then voluntarily admitted to his unlawful presence in an application for registration.

Sandoval-Sanchez was also not prosecuted for his initial illegal entry into this country, an independent crime under 8 U. S. C. § 1325. We need not decide whether or not remaining in this country following an illegal entry is a continuing or a completed crime under § 1325. The question is academic, of course, since in either event the unlawful entry remains both punishable and continuing grounds for deportation. See 8 U. S. C. § 1251(a)(2).

[4] Similarly, in *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883 (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien's illegal presence in this country. Retrospective sanctions against the employer may accord-

Other factors also weigh against applying the exclusionary rule in deportation proceedings. The INS currently operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions, and it is against this backdrop that the costs of the exclusionary rule must be assessed. The costs of applying the exclusionary rule, like the benefits, must be measured at the margin.

The average immigration judge handles about six deportation hearings per day. Brief for Petitioner 27, n. 16. Neither the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law. The prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings. The BIA has described the practical problems as follows:

> "Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony . . . . The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective adminis-

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ingly be imposed by the National Labor Relations Board to further the public policy against unfair labor practices. But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief—reinstatement and continued employment—that probably would be granted to other victims of similar unfair labor practices.

> tration of the immigration laws . . . . This is particularly true in a proceeding where delay may be the only 'defense' available and where problems already exist with the use of dilatory tactics." *Matter of Sandoval*, 17 I. & N., at 80 (footnote omitted).

This sober assessment of the exclusionary rule's likely costs, by the agency that would have to administer the rule in at least the administrative tiers of its application, cannot be brushed off lightly.

The BIA's concerns are reinforced by the staggering dimension of the problem that the INS confronts. Immigration officers apprehend over one million deportable aliens in this country every year. *Id.*, at 85. A single agent may arrest many illegal aliens every day. Although the investigatory burden does not justify the commission of constitutional violations, the officers cannot be expected to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest. At present an officer simply completes a "Record of Deportable Alien" that is introduced to prove the INS's case at the deportation hearing; the officer rarely must attend the hearing. Fourth Amendment suppression hearings would undoubtedly require considerably more, and the likely burden on the administration of the immigration laws would be correspondingly severe.

Finally, the INS advances the credible argument that applying the exclusionary rule to deportation proceedings might well result in the suppression of large amounts of information that had been obtained entirely lawfully. INS arrests occur in crowded and confused circumstances. Though the INS agents are instructed to follow procedures that adequately protect Fourth Amendment interests, agents will usually be able to testify only to the fact that they followed INS rules. The demand for a precise account of exactly what happened in each particular arrest would plainly preclude mass arrests, even when the INS is confronted, as it often is, with massed numbers of ascertainably illegal aliens, and even when the arrests can be and are conducted in full compliance with all Fourth Amendment requirements.

In these circumstances we are persuaded that the *Janis* balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS. By all appearances the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this makes the likely additional deterrent value of the exclusionary rule small. The costs of applying the exclusionary rule in the context of civil deportation hearings are high. In particular, application of the exclusionary rule in cases such as Sandoval-Sanchez', would compel the courts to release from custody persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country. "There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." *United States* v. *Janis*, 428 U. S., at 459. That point has been reached here.

## V

We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez-Mendoza or Sandoval-Sanchez. Moreover, no challenge is raised here to the INS's own internal regulations. Cf. *INS* v. *Delgado*, 466 U. S. 210 (1984). Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread. Cf. *United States* v. *Leon*, *ante*, at 928 (BLACKMUN, J., concurring). Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.[5] Cf. *Rochin* v. *California*, 342 U. S. 165 (1952). At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing.

The judgment of the Court of Appeals is therefore

*Reversed.*

JUSTICE BRENNAN, dissenting.

I fully agree with JUSTICE WHITE that under the analysis developed by the Court in such cases as *United States* v. *Janis*, 428 U. S. 433 (1976), and *United States* v. *Calandra*, 414 U. S. 338 (1974), the exclusionary rule must apply in civil deportation proceedings. However, for the reasons set forth today in my dissenting opinion in *United States* v. *Leon*, *ante*, p. 897, I believe the basis for the exclusionary rule does not derive from its effectiveness as a deterrent, but is instead found in the requirements of the Fourth Amendment itself. My view of the exclusionary rule would, of course, require affirmance of the Court of Appeals. In this case, federal law enforcement officers arrested respondents Sandoval-Sanchez and Lopez-Mendoza in violation of their Fourth Amendment rights. The subsequent admission of any evidence secured pursuant to these unlawful arrests in civil deportation proceedings would, in my view, also infringe those rights. The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.

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[5] We note that subsequent to its decision in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979), the BIA held that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby "fundamentally unfair" and in violation of due process requirements of the Fifth Amendment. *Matter of Toro*, 17 I. &. N. Dec. 340, 343 (1980). See also *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (1980) (suppression of admission of alienage obtained after request for counsel had been repeatedly refused); *Matter of Ramira-Cordova*, No. A21 095 659 (Feb. 21, 1980) (suppression of evidence obtained as a result of a nighttime warrantless entry into the aliens' residence).

JUSTICE WHITE, dissenting.

The Court today holds that the exclusionary rule does not apply in civil deportation proceedings. Because I believe that the conclusion of the majority is based upon an incorrect assessment of the costs and benefits of applying the rule in such proceedings, I respectfully dissent.[1]

The paradigmatic case in which the exclusionary rule is applied is when the prosecutor seeks to use evidence illegally obtained by law enforcement officials in his case in chief in a criminal trial. In other classes of cases, the rule is applicable only when the likelihood of deterring the unwanted conduct outweighs the societal costs imposed by exclusion of relevant evidence. *United States* v. *Janis*, 428 U. S. 433, 454 (1976). Thus, the Court has, in a number of situations, refused to extend the exclusionary rule to proceedings other than the criminal trial itself. For example, in *Stone* v. *Powell*, 428 U. S. 465 (1976), the Court held that the deterrent effect of the rule would not be reduced by refusing to allow a state prisoner to litigate a Fourth Amendment claim in federal habeas corpus proceedings if he was afforded a full and fair opportunity to litigate it in state court. Similarly, in *United*

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[1] I also question the Court's finding that Lopez-Mendoza failed to object to admission of the evidence. *Ante*, at 1040, and n. 1. The Court of Appeals held that he had made a proper objection, 705 F. 2d 1059, 1060, n. 1 (CA9 1983), and the INS did not seek review of that conclusion, Brief for Petitioner 8, n. 8. Moreover, the fact that changes in an opinion are made between the time of the slip opinion and the bound volume has never before been considered evidence that the holding of a case is "unsettled." See *ante*, at 1040, n. 1.

*States* v. *Calandra*, 414 U. S. 338, 351 (1974), we concluded that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." And in *United States* v. *Janis*, *supra*, we declined to extend the exclusionary rule to bar the introduction in a federal civil proceeding of evidence unconstitutionally seized by a state law enforcement officer. In all of these cases it was unquestioned that the illegally seized evidence would not be admissible in the case in chief of the proceeding for which the evidence was gathered; only its collateral use was permitted.

Civil deportation proceedings are in no sense "collateral." The majority correctly acknowledges that the "primary objective" of the INS agent is "to use evidence in the civil deportation proceeding" and that "the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action." *Ante*, at 1043. The Immigration and Naturalization Service likewise concedes that INS agents are "in the business of conducting searches for and seizures of illegal aliens for the purpose of bringing about their deportation." Brief for Petitioner 37. Thus, unlike the situation in *Janis*, the conduct challenged here falls within "the offending officer's zone of primary interest." 428 U. S., at 458. The majority nonetheless concludes that application of the rule in such proceedings is unlikely to provide significant deterrence. Because INS agents are law enforcement officials whose mission is closely analogous to that of police officers and because civil deportation proceedings are to INS agents what criminal trials are to police officers, I cannot agree with that assessment.

The exclusionary rule rests on the Court's belief that exclusion has a sufficient deterrent effect to justify its imposition, and the Court has not abandoned the rule. As long as that is the case, there is no principled basis for distinguishing between the deterrent effect of the rule in criminal cases and in civil deportation proceedings. The majority attempts to justify the distinction by asserting that deportation will still be possible when evidence not derived from the illegal search or seizure is independently sufficient. *Ante*, at 1043–1044. However, that is no less true in criminal cases. The suppression of some evidence does not bar prosecution for the crime, and in many cases even though some evidence is suppressed a conviction will nonetheless be obtained.

The majority also suggests that the fact that most aliens elect voluntary departure dilutes the deterrent effect of the exclusionary rule, because the infrequency of challenges to admission of evidence will mean that "the consequences from the point of view of the officer's overall arrest and deportation record will be trivial." *Ante*, at 1044. It is true that a majority of apprehended aliens elect voluntary departure, while a lesser number go through civil deportation proceedings and a still smaller number are criminally prosecuted. However, that fact no more diminishes the importance of the exclusionary sanction than the fact that many criminal defendants plead guilty dilutes the rule's deterrent effect in criminal cases. The possibility of exclusion of evidence quite obviously plays a part in the decision whether to contest either civil deportation or criminal prosecution. Moreover, in concentrating on the incentives under which the individual agent operates to the exclusion of the incentives under which the agency as a whole operates neglects the "systemic" deterrent effect that may lead the agency to adopt policies and procedures that conform to Fourth Amendment standards. See, *e. g.*, *Dunaway* v. *New York*, 442 U. S. 200, 221 (1979) (STEVENS, J., concurring).

The majority believes "perhaps most important" the fact that the INS has a "comprehensive scheme" in place for deterring Fourth Amendment violations by punishing agents who commit such violations, but it points to not a single instance in which that scheme has been invoked.[2] *Ante*, at

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[2] The INS suggests that its disciplinary rules are "not mere paper procedures" and that over a period of four years 20 officers were suspended or terminated for misconduct toward aliens. Brief for Petitioner 45, n. 28. The INS does not assert, however, that any of these officers were disci-

1044–1045. Also, immigration officers are instructed and examined in Fourth Amendment law, and it is suggested that this education is another reason why the exclusionary rule is unnecessary. *Ibid.* A contrary lesson could be discerned from the existence of these programs, however, when it is recalled that they were instituted during "a legal regime in which the cases and commentators uniformly sanctioned the invocation of the rule in deportation proceedings." 705 F. 2d 1059, 1071 (CA9 1983). Thus, rather than supporting a conclusion that the exclusionary rule is unnecessary, the existence of these programs instead suggests that the exclusionary rule has created incentives for the agency to ensure that its officers follow the dictates of the Constitution. Since the deterrent function of the rule is furthered if it alters either "the behavior of individual law enforcement officers or the policies of their departments," *United States* v. *Leon*, *ante*, at 918, it seems likely that it was the rule's deterrent effect that led to the programs to which the Court now points for its assertion that the rule would have no deterrent effect.

The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts. Moreover, those who are legally in the country but are nonetheless subjected to illegal searches and seizures are likely to be poor and uneducated, and many will not speak English. It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the Nation's immigration laws.

It is also my belief that the majority exaggerates the costs associated with applying the exclusionary rule in this context. Evidence obtained through violation of the Fourth Amendment is not automatically suppressed, and any inquiry

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plined for Fourth Amendment violations, and it appears that the 11 officers who were terminated were terminated for rape or assault. See Brief for Respondents 60, n. 42.

into the burdens associated with application of the exclusionary rule must take that fact into account. In *United States* v. *Leon*, *ante*, p. 897, we have held that the exclusionary rule is not applicable when officers are acting in objective good faith. Thus, if the agents neither knew nor should have known that they were acting contrary to the dictates of the Fourth Amendment, evidence will not be suppressed even if it is held that their conduct was illegal.

As is noted *ante*, at 1051, n. 5, the BIA has already held that evidence will be suppressed if it results from egregious violations of constitutional standards. Thus, the mechanism for dealing with suppression motions exists and is utilized, significantly decreasing the force of the majority's predictions of dire consequences flowing from "even occasional invocation of the exclusionary rule." *Ante*, at 1048. Although the standard currently utilized by the BIA may not be precisely coextensive with the good-faith exception, any incremental increase in the amount of evidence that is suppressed through application of *Leon* is unlikely to be significant. Likewise, any difference that may exist between the two standards is unlikely to increase significantly the number of suppression motions filed.

Contrary to the view of the majority, it is not the case that Sandoval-Sanchez' "unregistered presence in this country, without more, constitutes a crime." *Ante*, at 1047. Section 275 of the Immigration and Nationality Act makes it a crime to enter the United States illegally. 8 U. S. C. § 1325.[3] The first offense constitutes a misdemeanor, and subsequent offenses constitute felonies. *Ibid.* Those few cases that have construed this statute have held that a violation takes place at the time of entry and that the statute does not describe a continuing offense. *Gonzales* v. *City of Peoria*, 722 F. 2d 468, 473–474 (CA9 1983); *United States* v. *Rincon-Jimenez*, 595 F. 2d 1192, 1194 (CA9 1979). Although this Court has not construed the statute, it has suggested in dictum that this interpretation is correct, *United States* v. *Cores*, 356 U. S. 405, 408, n. 6 (1958), and it is relatively clear that such an interpretation is most consistent with the statutory language. Therefore, it is simply not the case that suppressing evidence in deportation proceedings will "allo[w] the criminal to continue in the commission of an ongoing crime." *Ante*, at 1047. It is true that some courts have construed § 276 of the Act, 8 U. S. C. § 1326, which applies to aliens previously deported who enter or are found in the United States, to describe a continuing offense.[4] *United States* v. *Bruno*, 328 F. Supp. 815 (WD Mo. 1971); *United States* v. *Alvarado-Soto*, 120 F. Supp. 848 (SD Cal. 1954); *United States* v. *Rincon-Jimenez*, *supra* (dictum). But see *United States* v. *DiSantillo*, 615 F. 2d 128 (CA3 1980). In such cases, however, the Government will have a record of the prior deportation and will have little need for any evidence that might be suppressed through application of the exclusionary rule. See *United States* v. *Pineda-Chinchilla*, 712 F. 2d 942 (CA5 1983) (illegality of arrest does not bar introduction of INS records to demonstrate prior deportation), cert. denied, 464 U. S. 964 (1983).

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[3] Section 275 provides in part:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation . . . shall be guilty of a [crime]. . . ." 8 U. S. C. § 1325.

Although the majority relies on the registration provisions of 8 U. S. C. §§ 1302 and 1306 for its "continuing crime" argument, those provisions provide little support for the general rule laid down that the exclusionary rule does not apply in civil deportation proceedings. First, § 1302 requires that aliens register within 30 days of entry into the country. Thus, for the first 30 days failure to register is not a crime. Second, § 1306 provides that only *willful* failure to register is a misdemeanor. Therefore, "unregistered presence in this country, without more," *ante*, at 1047, does not constitute a crime; rather, unregistered presence plus willfulness must be shown. There is no finding that Sandoval-Sanchez willfully failed to register, which is a necessary predicate to the conclusion that he is engaged in a continuing crime. Third, only aliens 14 years of age or older are required to register; those under 14 years of age are to be registered by their parents or guardian. By the majority's reasoning, therefore, perhaps the exclusionary rule should apply in proceedings to deport children under 14, since their failure to register does not constitute a crime.

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[4] Section 276 provides in part:

"Any alien who—

"(1) has been arrested and deported or excluded and deported, and thereafter

"(2) enters, attempts to enter, or is at any time found in, the United States . . .

shall be guilty of a felony." 8 U. S. C. § 1326.

Application of the rule, we are told, will also seriously interfere with the "streamlined" nature of deportation hearings because "[n]either the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law." *Ante*, at 1048. Yet the majority deprecates the deterrent benefit of the exclusionary rule in part on the ground that immigration officers receive a thorough education in Fourth Amendment law. *Ante*, at 1044–1045. The implication that hearing officers should defer to law enforcement officers' superior understanding of constitutional principles is startling indeed.

Prior to the decision of the Board of Immigration Appeals in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979), neither the Board nor any court had held that the exclusionary rule did not apply in civil deportation proceedings. 705 F. 2d, at 1071. The Board in *Sandoval* noted that there were "fewer than fifty" BIA proceedings since 1952 in which motions had been made to suppress evidence on Fourth Amendment grounds. This is so despite the fact that "immigration law practitioners have been informed by the major treatise in their field that the exclusionary rule was available to clients facing deportation. *See* 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure § 5.2c at 5–31 (rev. ed. 1980)." 705 F. 2d, at 1071. The suggestion that "[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings," *ante*, at 1048, is thus difficult to credit. The simple fact is that prior to 1979 the exclusionary rule was available in civil deportation proceedings, and there is no indication that it significantly interfered with the ability of the INS to function.

Finally, the majority suggests that application of the exclusionary rule might well result in the suppression of large amounts of information legally obtained because of the "crowded and confused circumstances" surrounding mass arrests. *Ante*, at 1049. The result would be that INS agents would have to keep a "precise account of exactly what happened in each particular arrest," which would be impractical considering the "massed numbers of ascertainably illegal aliens." *Ante*, at 1049–1050. Rather than constituting a rejection of the application of the exclusionary rule in civil deportation proceedings, however, this argument amounts to a rejection of the application of the Fourth Amendment to the activities of INS agents. If the pandemonium attending immigration arrests is so great that violations of the Fourth Amendment cannot be ascertained for the purpose of applying the exclusionary rule, there is no reason to think that such violations can be ascertained for purposes of civil suits or internal disciplinary proceedings, both of which are proceedings that the majority suggests provide adequate deterrence against Fourth Amendment violations. The Court may be willing to throw up its hands in dismay because it is administratively inconvenient to determine whether constitutional rights have been violated, but we neglect our duty when we subordinate constitutional rights to expediency in such a manner. Particularly is this so when, as here, there is but a weak showing that administrative efficiency will be seriously compromised.

In sum, I believe that the costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the costs and benefits of applying the rule in ordinary criminal proceedings. Unless the exclusionary rule is to be wholly done away with and the Court's belief that it has deterrent effects abandoned, it should be applied in deportation proceedings when evidence has been obtained by deliberate violations of the Fourth Amendment or by conduct a reasonably competent officer would know is contrary to the Constitution. Accordingly, I dissent.

JUSTICE MARSHALL, dissenting.

I agree with JUSTICE WHITE that application to this case of the mode of analysis embodied in the decisions of the Court in *United States* v. *Janis*, 428 U. S. 433 (1976), and *United States* v. *Calandra*, 414 U. S. 338 (1974), compels the conclusion that the exclusionary rule should apply in civil deportation proceedings. *Ante*, at 1052–1054. However, I continue to believe that that mode of analysis fails to reflect the constitutionally mandated character of the exclusionary rule. See *United States* v. *Leon*, *ante*, at 931–938 (BRENNAN, J., joined by MARSHALL, J., dissenting); *United States* v. *Janis*, *supra*, at 460 (BRENNAN, J., joined by MARSHALL, J., dissenting). In my view, a sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States* v. *Calandra*, *supra*, at 357 (BRENNAN, J., joined by MARSHALL, J., dissenting).

JUSTICE STEVENS, dissenting.

Because the Court has not yet held that the rule of *United States* v. *Leon*, *ante*, p. 897, has any application to warrantless searches, I do not join the portion of JUSTICE WHITE's opinion that relies on that case. I do, however, agree with the remainder of his dissenting opinion.

# PAYNE *v.* VIRGINIA

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 82–6935. Decided July 5, 1984

*Held:* The Double Jeopardy Clause barred the state-court prosecution and conviction of petitioner for the lesser included offense of robbery that followed his prior conviction for capital murder committed during the perpetration of the robbery.

Certiorari granted; reversed.

PER CURIAM.

This petition for certiorari seeks review of a judgment of the Supreme Court of Virginia rejecting petitioner's double jeopardy challenge to a conviction for robbery which followed a prior conviction for capital murder committed during the perpetration of the robbery while armed with a deadly weapon. In this case, as in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) *(per curiam)*, where "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery . . . , the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Ibid.* See also *In re Nielsen*, 131 U. S. 176, 188 (1889).

Accordingly, the motion for leave to proceed *in forma pauperis* is granted, the petition for writ of certiorari is granted, and the judgment of the Supreme Court of Virginia is reversed. *Harris* v. *Oklahoma*, *supra.*

*It is so ordered.*

## REPORTER'S NOTE

The next page is purposely numbered 1201. The numbers between 1062 and 1201 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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## ORDERS FROM JULY 2 THROUGH SEPTEMBER 19, 1984

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### JULY 2, 1984

*Dismissal Under Rule 53*

No. 83–1843. MITCHELL ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, MARIN COUNTY (MOUNTANOS, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 1st App. Dist., dismissed under this Court's Rule 53.

*Vacated and Remanded on Appeal*

No. 83–1564. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL. Appeal from D. C. S. D. N. Y. Judgment vacated and case remanded for further consideration in light of *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 571 F. Supp. 117.

*Certiorari Granted—Vacated and Remanded*

No. 83–902. BOEING VERTOL CO. ET AL. *v.* EDWARDS. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867 (1984). Reported below: 717 F. 2d 761.

No. 83–1506. TERRY *v.* BOTHKE. C. A. 9th Cir. Motion of respondent for damages denied. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *Scherer*, *ante*, p. 183. Reported below: 713 F. 2d 1405.

*Miscellaneous Orders*

No. A–888. PEARCE *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–974. WISCONSIN ELECTIONS BOARD ET AL. *v.* REPUBLICAN PARTY OF WISCONSIN ET AL. Motion to vacate the stay, heretofore entered by the Court on June 7, 1984 [467 U. S. 1232], denied.

No. A–1027. HARGRAVES *v.* SCRIVNER, JUDGE OF THE TWENTIETH JUDICIAL CIRCUIT COURT OF ST. CLAIR COUNTY, ILLINOIS, ET AL. Cir. Ct., St. Clair County, Ill. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. D–419. IN RE DISBARMENT OF STEVENS. Disbarment entered. [For earlier order herein, see 466 U. S. 948.]

No. D–435. IN RE DISBARMENT OF MANN. William Davis Mann, of Akron, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 11, 1984 [467 U. S. 1237], is hereby discharged.

No. 65, Orig. TEXAS *v.* NEW MEXICO. The Honorable Jean Sala Breitenstein, whose long and invaluable service to the Court in this case is deeply appreciated, has requested that he be relieved of his duties as Special Master, and the Court having granted that request, it is necessary that a Special Master be appointed to conclude this case. It is therefore ordered that Charles J. Meyers of Denver, Colo., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, 467 U. S. 1238.]

No. 82–1295. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL., 466 U. S. 48. Motion of appellees to retax costs denied.

No. 83–599. CAPITAL CITIES MEDIA, INC., TDBA THE WILKES-BARRE TIMES LEADER, ET AL. *v.* TOOLE, JUDGE, COURT OF COMMON PLEAS OF LUZERNE COUNTY, 466 U. S. 378. Motion of respondent to retax costs denied.

No. 83-703. FLORIDA POWER & LIGHT CO. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL.; and

No. 83-1031. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* LORION ET AL. C. A. D. C. Cir. [Certiorari granted, 466 U. S. 903.] Motion of petitioner in No. 83-703 for divided argument granted, and a total of 15 minutes allotted for that purpose. Motion of the Solicitor General for divided argument granted, and a total of 15 minutes allotted for that purpose.

No. 83-727. ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. *v.* CHOATE ET AL. C. A. 6th Cir. [Certiorari granted *sub nom. Alexander* v. *Jennings*, 465 U. S. 1021.] Motion of respondent Hershel Choate for leave to proceed further herein *in forma pauperis* granted.

No. 83-1170. UNITED STATES *v.* 50 ACRES OF LAND ET AL. C. A. 5th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of respondents and National Governors' Association et al. for divided argument to permit National Governors' Association et al. to present oral argument as *amici curiae* denied.

No. 83-1362. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.;

No. 83-1363. PARMA BOARD OF EDUCATION *v.* DONNELLY ET AL.; and

No. 83-6392. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1204.] Motion of James Loudermill for appointment of counsel granted, and it is ordered that Robert M. Fertel, Esquire, of Cleveland, Ohio, be appointed pursuant to Rule 46.6 to serve as counsel for James Loudermill in these cases.

No. 83-1897. IN RE FERNANDEZ-TOLEDO ET AL. Motion of petitioners to expedite consideration of the petition for writ of mandamus denied.

No. 83-6610 (A-1024). BARFIELD *v.* HARRIS, SUPERINTENDENT, NORTH CAROLINA CORRECTIONAL CENTER FOR WOMEN, ET AL., 467 U. S. 1210. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, is granted pending further order of the Court. Respondent is requested to file a response to the petition for rehearing within 30 days.

*Certiorari Granted*

No. 82–1889. SPRINGFIELD TOWNSHIP SCHOOL DISTRICT ET AL. *v.* KNOLL. C. A. 3d Cir. Certiorari granted. Reported below: 699 F. 2d 137.

*Certiorari Denied*

No. 82–1778. SELLFORS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 2d 1362.

No. 83–861. CITY OF COLUMBUS ET AL. *v.* LEONARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 705 F. 2d 1299.

No. 82–2079. ALABAMA *v.* PRINCE. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 431 So. 2d 565.

No. 83–1429. ALABAMA POWER CO. ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 231 U. S. App. D. C. 192, 719 F. 2d 436.

*Rehearing Denied*

No. 83–1457. RIVERA-RAMIREZ *v.* UNITED STATES, 467 U. S. 1215;

No. 83–1617. COLEMAN *v.* AMERICAN CYANAMID CO. ET AL., 467 U. S. 1215;

No. 83–6514. TILLI *v.* CAPOBIANCO ET AL., 467 U. S. 1217; and

No. 83–6629. KAVANAUGH *v.* SPERRY UNIVAC, 467 U. S. 1218. Petitions for rehearing denied.

No. 83–382. RUSH *v.* UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., 464 U. S. 1052 and 465 U. S. 1074. Motion of petitioner for leave to file second petition for rehearing denied.

No. 83–592. OSTROSKY ET AL. *v.* ALASKA, 467 U. S. 1201. Motion of appellants for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 83–1345. UNION CARBIDE CORP. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., 467 U. S. 1219. Petition for rehearing denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 82–1587. CHRISTIAN *v.* MASSACHUSETTS ET AL., 461 U. S. 907;

No. 83–1674. YOUNG *v.* COMMISSIONER OF INTERNAL REVENUE, 467 U. S. 1206; and

No. 83–6374. ATTWELL ET UX. *v.* HERITAGE BANK OF MOUNT PLEASANT ET AL., 466 U. S. 953. Motions for leave to file petitions for rehearing denied.

JULY 5, 1984

*Dismissals Under Rule 53*

No. 83–1941. TROSCLAIR *v.* LOUISIANA. Sup. Ct. La. Certiorari dismissed under this Court's Rule 53. Reported below: 443 So. 2d 1098.

No. 83–1757. COTTON STATES MUTUAL INSURANCE CO. *v.* MCFATHER ET AL. Appeal from Sup. Ct. Ga. dismissed under this Court's Rule 53. Reported below: 251 Ga. 739, 309 S. E. 2d 799.

*Appeals Dismissed*

No. 83–651. FEDERAL COMMUNICATIONS COMMISSION *v.* LEAGUE OF WOMEN VOTERS OF CALIFORNIA ET AL. Appeal from D. C. C. D. Cal. dismissed for want of jurisdiction.

No. 83–1513. MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA *v.* CURRAN. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of a final judgment. Reported below: 147 Cal. App. 3d 712, 195 Cal. Rptr. 325.

*Vacated and Remanded on Appeal*

No. 83–637. MINNESOTA PUBLIC INTEREST RESEARCH GROUP *v.* SELECTIVE SERVICE SYSTEM ET AL. Appeal from D. C. Minn. The order of the United States Court of Appeals for the Eighth Circuit filed August 17, 1983, transferring this case to the Supreme Court of the United States pursuant to 28 U. S. C. § 1252 is vacated, and the case is remanded to the Court of Appeals to consider whether appellant has standing. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 557 F. Supp. 925.

*Certiorari Granted—Vacated and Remanded*

No. 82–315. OREGON *v.* ROBERTI. Sup. Ct. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Berkemer* v. *McCarty*, *ante*, p. 420. Reported below: 293 Ore. 236, 646 P. 2d 1341.

No. 82–819. UNITED STATES *v.* CROZIER ET AL. C. A. 9th Cir. Motion of respondent Florence Margaret Wolke for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Segura* v. *United States*, *ante*, p. 796; *United States* v. *Leon*, *ante*, p. 897; and *United States* v. *$8,850*, 461 U. S. 555 (1983). Reported below: 674 F. 2d 1293.

No. 83–24. UNITED STATES *v.* TATE ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Leon*, *ante*, p. 897. Reported below: 694 F. 2d 1217.

No. 83–817. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* DOUGLAS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Reported below: 714 F. 2d 1532.

No. 83–866. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, INC., ET AL.; and

No. 83–885. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). JUSTICE MARSHALL took no part in the consideration or decision of these cases. Reported below: 716 F. 2d 931.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The Court today logically applies yesterday's illogic. I cannot disagree with the Court's conclusion that the mootness issue in these cases is similar to some portions of the mootness issue in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). I therefore do not dispute that there is reason to think that the decision in *Stotts* bears on the Court of Appeals' conclusion that these cases are moot. In my view, however, the portions of *Stotts* relevant to the mootness issue in this case are demonstrably wrong; they depart sharply from our precedents and ignore the jurisdictional limits imposed by the "case or controversy" requirements of Article

III of the Constitution. The sooner they are forgotten, the earlier that the longstanding principles governing mootness doctrine can be resurrected. The Court of Appeals disposed of these cases in accordance with those principles, and I would let its ruling stand.

## I

The controversy in these cases has remarkable similarity to the controversy in *Stotts*. It began when the city of Boston announced a plan to conduct a reduction in force as a response to its fiscal difficulties. The proposed reductions included layoffs in the Police and Fire Departments, both of which were operating under consent decrees to remedy past discrimination. Those decrees required the Departments to engage in preferential hiring of members of minority groups in order to raise the representation of minorities in the Departments to the level in the surrounding work force. The proposed layoffs were to be conducted on a "last-hired, first-fired" basis, and would have affected many minority persons hired under the consent decree.

Minority officers brought suit in federal court to enjoin the layoffs, and the court concluded that seniority-based layoffs would impede its efforts to remedy the past discrimination. Accordingly, the District Court enjoined the Police and Fire Departments from conducting layoffs in a manner that would reduce the percentage of minorities employed in those Departments. *Castro* v. *Beecher*, 522 F. Supp. 873 (Mass. 1981). As a consequence, some nonminority employees were laid off ahead of minorities with less seniority. The State Civil Service Commission and the unions representing affected nonminority persons challenged the orders of the District Court. The Court of Appeals, however, affirmed. *Boston Chapter, NAACP* v. *Beecher*, 679 F. 2d 965 (CA1 1982).

Following the Court of Appeals' decision and this Court's grant of certiorari to review it, 459 U. S. 967 (1982), the Massachusetts Legislature enacted the Tregor Act to address the situation. 1982 Mass. Acts, ch. 190. That legislation provided the city of Boston with new revenues, required reinstatement of all police and firefighters laid off during the reductions in force, secured those personnel against future layoffs for fiscal reasons, and required the maintenance of minimum-staffing levels in the Police and Fire Departments through June 30, 1983. This legislative action terminated all layoffs, and greatly diminished the risk that future layoffs might take place. Respondents argued before this Court that the legislation rendered the controversy in these cases moot, and deprived the Court of jurisdiction to decide them. Because the legislation's effects raised serious questions concerning this Court's jurisdiction, we vacated the Court of Appeals' judgment and remanded the case for consideration of mootness in light of the Tregor Act. *Firefighters* v. *Boston Chapter, NAACP*, 461 U. S. 477 (1983).

On remand, the Court of Appeals held that the Tregor Act's mandatory reinstatement of all laid-off police and firefighters, and its requirement of minimum-staffing levels, removed the legally cognizable stake that the litigants had in the suits before the layoffs ended. *Boston Chapter, NAACP* v. *Beecher*, 716 F. 2d 931 (CA1 1983). The court also rejected the claim that the controversy presented by the case was "capable of repetition yet evading review." If future layoffs occurred despite the Tregor Act, the court explained, there was no reason to assume that the state legislature would once again intervene before resolution by this Court. Finally, the court rejected the claim that these cases remain live because the District Court order interferes with backpay claims filed with the State Civil Service Commission by the affected nonminority workers. The Court of Appeals explained that those issues properly were to be resolved in the administrative proceedings before the Commission.

## II

Because the Tregor Act is a Massachusetts statute, and *Stotts* involved layoffs in Tennessee, this Court's decision in *Stotts* obviously sheds no light on whether the Court of Appeals properly assessed the Tregor Act's effect on the likelihood that future layoffs will occur in the Boston Police and Fire Departments. This Court's decision in *Stotts* bears only on the question whether the backpay claims of individuals affected by the Boston layoffs create a controversy sufficient to provide a federal court with jurisdiction over these cases. The nature of those claims and the most basic principles of Article III make clear that they do not.

The elements of Article III's "case or controversy" requirement are well established. Among them is the requirement that parties before the Court have legally cognizable interests that are adverse to each other. Such adversity of interests must exist "at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In addition, a complaining party must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38 (1976). A ruling that does not provide any relief to the prevailing party ignores the duty of federal courts "'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Oil Workers* v. *Missouri*, 361 U. S. 363, 367 (1960), quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895).

When a case becomes moot while pending review, it is the "duty of the appellate court" to vacate the judgment below and remand with directions to dismiss. *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936). "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950). This disposition serves the purpose of preserving the rights of all parties to the controversy in any future litigation that might arise presenting similar issues.

Application of these principles makes it readily apparent that backpay claims filed against the city do not keep these cases alive and that the Court of Appeals correctly found them to be moot. First, claims for backpay simply are not a part of these cases. Petitioners do not seek backpay in them, and a decision of these cases will not provide backpay to anyone. It may be true, as the parties concede, that backpay claims are being litigated, or already have been decided, in administrative proceedings before the State Civil Service Commission. But the status of any such litigation is irrelevant here, for it has always been the rule that a case is not kept alive because of issues that might arise in other proceedings in another forum. A federal court's jurisdiction is determined by the conditions of the case before it. *Oil Workers* v. *Missouri*, 361 U. S., at 370 ("'Our power only extends over and is limited by the conditions of the case now before us,'" quoting *American Book Co.* v. *Kansas*, 193 U. S. 49, 52 (1904)). Because backpay is not an issue in these cases, it cannot provide a jurisdictional basis for these suits.

Second, it is apparent that the minority officers have no stake in the resolution of backpay claims of others filed with the State Civil

Service Commission. If backpay is awarded, it will come from the city, not from the minority officers, who are not parties to those proceedings, and who have no interest in whether such backpay is awarded. The possible dispute over backpay therefore does not create a controversy with respect to the minority officers who are respondents in these cases.

The Court of Appeals based its conclusion that these cases are moot on precisely these considerations. In rejecting the claim that backpay issues keep these cases live, the court explained:

> "According to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated. Thus even assuming . . . that the district court's order directly inhibits the state Civil Service Commission respecting the backpay claims, it will no longer do so. To be sure, a definitive ruling on the constitutionality of the district court's past order might facilitate the Civil Service Commission's resolution of the back pay claims. But such a ruling now—rendered in the absence of a present case or controversy in this proceeding—would amount to no more than an advisory opinion. The federal courts are forbidden by Article III of the Constitution from giving advisory opinions. [Petitioners'] interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present both live issues and parties with legally cognizable interests. Plaintiffs now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding. The Civil Service Commission must therefore be left to decide the back pay claims under the governing state law without an advisory resolution of the constitutional issue by the federal courts." 716 F. 2d, at 933 (citations omitted).

Nothing in this Court's opinion in *Stotts* explains why these principles are not fully applicable here. It is true that *Stotts* involved ancillary backpay issues somewhat similar to those in these cases, but the Court's opinion never explained why vacating the District Court's orders would not have cleared the path for full litigation of the backpay issues in an appropriate proceeding involving adverse parties. Instead, this Court's opinion in *Stotts* proceeded from the misconception that even if the District Court's orders in those cases were vacated, they still might control backpay claims. 467 U. S., at 571. Because a vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation, the portion of the Court's decision in *Stotts* that assumes the contrary is tautologically incorrect.

In addition to being controlled by longstanding principles of Article III, these cases attest to the underlying wisdom of those tenets. Petitioners do not suggest that they are entitled to backpay under Title VII of the Civil Rights Act of 1964. Any backpay claims that may have arisen as a result of the Boston layoffs presumably are controlled by state rather than federal law. We cannot claim familiarity with the standards governing such claims, and hence we are in no position to determine how the federal questions formerly presented by these cases are relevant to the claims for backpay under state law. It seems likely, however, that the issue raised in the civil service proceedings is whether the layoffs of the nonminority persons were "justified" under state law. See Mass. Gen. Laws Ann., ch. 31, § 43 (West Supp. 1984–1985). To the extent that application of this standard might involve consideration of whether the layoffs were pursuant to a federal-court order, further review of these cases would shed no new light on that question. There is no dispute over whether the layoffs were conducted pursuant to outstanding federal-court orders that were validly entered and that the city had a legal duty to obey. See *Walker* v. *City of Birmingham*, 388 U. S. 307, 314 (1967) (court order entered by court with subject-matter and personal jurisdiction over case gives rise to a plain duty to obey until order is stayed, vacated, or reversed). If the Fire and Police Departments can defend backpay claims on the ground that the layoff of nonminority persons was justified because of the city's duty to obey a federal-court injunction, that defense presumably would exist regardless of whether the injunction is overturned on appeal. In any event, it is precisely because the issue of backpay is not being litigated in these cases, and hence the relevance of the District Court's injunction is unclear, that it is improper for a federal court to use those claims as a basis for its jurisdiction over these cases. If resolution of backpay claims under state law ultimately does involve a federal question, that question would be reviewable when presented as part of a decision resolving the backpay claims.

The Court's treatment of these cases is especially incongruous given that just last Term the Court implicitly rejected the view that backpay claims kept these cases live. When this Court vacated the judgment in these cases and remanded them to the Court of Appeals, the Court expressly based its decision on the possibility that the Tregor Act rendered the cases moot. 461 U. S., at 479. That Act affected only the prospective aspects of the layoffs; it ordered reinstatement of laid-off employees and protected them from similar layoffs in the future. There was no suggestion, either then or now, that the Tregor Act had any effect whatsoever on backpay claims stemming from layoffs in the past. Thus, the backpay claims that petitioners now assert as keeping these cases alive were in the same posture last Term. Had this Court then believed that backpay issues created a controversy in these cases, there would have been no reason to remand them to the Court of Appeals for consideration of the Tregor Act. By remanding the cases, this Court implicitly expressed its view that the backpay claims did not save the cases from being moot. The Court offers no explanation for taking a contrary position now.

## III

Because the Court of Appeals properly stayed within the scope of its Article III powers, I would simply deny the petitions for certiorari in these cases. If the Court believes that the Court of Appeals improperly applied the principles of Article III, the Court has a duty to explain why. It is incongruous for the Court simply to remand for further consideration of the mootness issue "in light of" *Stotts*, because the Court's opinion in *Stotts* ignored the principles that the Court of Appeals relied upon here. Rather than shedding any light on the mootness issue in these cases, *Stotts* casts a murky shadow over well-established Article III principles.

No. 83–995. DOUGLAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Waller* v. *Georgia*, 467 U. S. 39 (1984). Reported below: 714 F. 2d 1532.

No. 83–1037. UNITED STATES *v.* CROSS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hobby* v. *United States*, *ante*, p. 339. Reported below: 708 F. 2d 631.

No. 83–1393. UNITED STATES *v.* CASSITY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Leon, ante,* p. 897. Reported below: 720 F. 2d 451.

No. 83–1431. McDaniel et al. *v.* Georgia Association of Retarded Citizens et al.; and

No. 83–1451. Board of Public Education for the City of Savannah and the County of Chatham et al. *v.* Georgia Association of Retarded Citizens et al. C. A. 11th Cir. Motion of National School Boards Association et al. for leave to file a brief as *amici curiae* in No. 83–1431 granted. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Smith* v. *Robinson, ante,* p. 992. Reported below: 716 F. 2d 1565.

No. 83–1535. Immigration and Naturalization Service *v.* Olivas-Monorrez. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *Lopez-Mendoza, ante,* p. 1032. Reported below: 718 F. 2d 1111.

*Certiorari Granted—Reversed.* (See No. 82–6935, *ante,* p. 1062.)

*Miscellaneous Orders**

No. 35, Orig. United States *v.* Maine et al. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.,* 465 U. S. 1018.]

No. 81–1859. Illinois *v.* Lafayette, 462 U. S. 640. Motion of respondent for leave to proceed *in forma pauperis* granted. Respondent's petition for writ of error *coram nobis* to vacate the judgment in this case denied. Justice Marshall, Justice Rehnquist, and Justice O'Connor took no part in the consideration or decision of this motion.

No. 82–1913. Garcia *v.* San Antonio Metropolitan Transit Authority et al.; and

No. 82–1951. Donovan, Secretary of Labor *v.* San Antonio Metropolitan Transit Authority et al. D. C. W. D. Tex. [Probable jurisdiction noted, 464 U. S. 812.] Cases restored to calendar for reargument. In addition to the questions presented in the jurisdictional statements and previously briefed

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*For the Court's order prescribing amendments to the Rules of this Court, see *post,* p. 1253.

and argued, the parties are requested to brief and argue the following question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered?"

No. 83–18. DUN & BRADSTREET, INC. *v.* GREENMOSS BUILDERS, INC. Sup. Ct. Vt. [Certiorari granted, 464 U. S. 959.] Case restored to calendar for reargument. In addition to the questions presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following questions:

"1. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant?

"2. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?"

No. 83–712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Case restored to calendar for reargument. In addition to the question presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question: "Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?"

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In its decision in this case, the New Jersey Supreme Court addressed three distinct questions: (1) what is the proper standard for judging the reasonableness of a school official's search of a student's purse; (2) on the facts of this case, did the school official violate that standard; and (3) whether the exclusionary rule bars the use in a criminal proceeding of evidence that a school official obtained in violation of that standard. The Supreme Court held (1) that the correct standard is one of reasonable suspicion rather than probable cause; (2) that the standard was violated in this case; and (3) that the evidence obtained as the result of a violation may not be introduced in evidence against T. L. O. in any criminal proceeding, including this delinquency proceeding.

New Jersey's petition for certiorari sought review of only the third question.[1] The reasons why it did not seek review of either of the other two questions are tolerably clear. There is substantial agreement among appellate courts that the New Jersey Supreme Court applied the correct standard, and it is apparently one that the New Jersey law enforcement authorities favor. As far as the specific facts of the case are concerned, presumably New Jersey believed that this Court is too busy to take a case just for the purpose of reviewing the State Supreme Court's application of this standard to the specific facts of this case.

The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that New Jersey decided not to bring here. This is done even though New Jersey *agrees* with its Supreme Court's resolution of these questions, and has no desire to seek reversal on those grounds.[2] Thus, in this nonadversarial context, the Court has decided to plunge into the merits of the Fourth Amendment issues despite the fact that no litigant before it wants the Court's guidance on these questions. Volunteering unwanted advice is rarely a wise course of action.

Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen. In *United States* v. *Leon*, *ante*, at 905, and *Massachusetts* v. *Sheppard*, *ante*, at 988, n. 5, the Court fashioned a new exception to the exclusionary rule despite its acknowledgment that narrower grounds for decision were available in both cases.[3] In *United States* v. *Karo*, *ante*, p. 705, in order to reverse a decision requiring the suppression of evidence, the Court on its own initiative made an analysis of a factual question that had not been presented or argued by either of the parties and managed to find a basis for ruling in favor of the Government. In *Segura* v. *United States*, *ante*, p. 796, two creative Justices reached the surprising conclusion that an 18–20-hour warrantless occupation of a citizen's home was "reasonable," despite the fact that the issue had not been argued and the Government had expressly conceded the unreasonableness of the occupation. And, as I have previously observed, in recent Terms the Court has elected to use its power of summary disposition exclusively for the benefit of prosecutors.[4] In this case, the special judicial action is to order the parties to argue a constitutional question that they have no desire to raise, in a context in which a ground for decision that the Court currently views as nonconstitutional is available,[5] and on which the State's chief prosecutor believes no guidance from this Court is necessary.

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[1] The petition presented a single question for review: "Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school."

[2] At oral argument, the following colloquy took place between counsel for New Jersey and the bench:

"QUESTION: Well, do you think it is open to us to deal with the reasonableness of the search?

"MR. NODES: I believe that could be considered a question subsumed within the—

"QUESTION: But it wasn't your intention to raise it?

"MR. NODES: It wasn't our intention to raise it because we agree with the standard that was set forth by the New Jersey Supreme Court. We feel that that is a workable standard." Tr. of Oral Arg. 7.

I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review. I respectfully dissent.

*Certiorari Granted*

No. 83–963. BOARD OF LICENSE COMMISSIONERS OF THE TOWN OF TIVERTON *v.* PASTORE, LIQUOR CONTROL ADMINISTRATOR OF RHODE ISLAND, ET AL. Sup. Ct. R. I. Certiorari granted. Reported below: 463 A. 2d 161.

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[3] See *ante*, at 962–963 (STEVENS, J., concurring in judgment in *Sheppard* and dissenting in *Leon*).

[4] See *Florida* v. *Meyers*, 466 U. S. 380, 385–386, and n. 3 (1984) (STEVENS, J., dissenting).

[5] We are told that questions concerning the remedies for a Fourth Amendment violation are not constitutional in dimension. *United States* v. *Leon*, *ante*, at 905–906. Apparently, this Court has imposed the exclusionary rule on the States as a result of the Fourth Amendment's "invisible radiations," *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 780, n. 12 (1984), which act to somehow give the Court nonconstitutional supervisory powers over the state courts. My own view is different. See *ante*, at 978, and n. 37 (STEVENS, J., concurring in judgment in *Sheppard* and dissenting in *Leon*).

*Certiorari Denied*

No. 82–6230. ARNAU *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 27, 444 N. E. 2d 13.

No. 83–70. PENNSYLVANIA *v.* SANTNER. Super. Ct. Pa. Certiorari denied. Reported below: 308 Pa. Super. 67, 454 A. 2d 24.

No. 83–681. DENTICO ET AL. *v.* UNITED STATES;
No. 83–690. MUSTO ET AL. *v.* UNITED STATES; and
No. 83–806. D'AGOSTINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: Nos. 83–681 and 83–690, 715 F. 2d 822; No. 83–806, 722 F. 2d 735.

No. 83–979. CRONN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 164.

No. 83–5063. TRANOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 2d 668.

No. 83–5504. WILKINS *v.* WHITAKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 4.

No. 83–5689. TYDINGS *v.* DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 11.

No. 83–5861. PEREZ ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 52.

No. 83–5911. GOODAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 80.

No. 83–768. FAULKNER ET AL. *v.* WELLMAN ET AL. C. A. 7th Cir. Motion of respondents Dwight Walker and Billie R. Adams for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 F. 2d 269.

No. 83–1212. KENTUCKY *v.* HAMILTON. Sup. Ct. Ky. Certiorari denied. Reported below: 659 S. W. 2d 201.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

Respondent Hamilton was tried for the crimes of rape and incest, in which he was charged with having had sexual intercourse with his 10-year-old daughter. He was found guilty on both counts and was sentenced to life imprisonment on the rape charge and 10 years on the incest charge, the sentences to be served concurrently. The Supreme Court of Kentucky affirmed his conviction for rape and his sentence of life imprisonment, but reversed his conviction for incest. 659 S. W. 2d 201 (1983). That court was of the view that sentencing respondent for two different crimes based on the single act of intercourse with his daughter violated the constitutional guarantee against double jeopardy.

The Supreme Court of Kentucky believed that the closest analogy to the present case was our decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), in which we held that petitioner Harris, who had earlier been tried and convicted of the felony murder of a grocery clerk, could not be later tried for the armed robbery of the store which was the predicate offense for the felony-murder prosecution. In the present case, however, it is undisputed that the State defines rape as sexual intercourse with one who is less than 12 years old, Ky. Rev. Stat. § 510.040(1)(b)(2) (1975), and defines incest as sexual intercourse with a member of one's family, Ky. Rev. Stat. § 530.020 (1975). Thus while both offenses require the element of sexual intercourse, each requires an additional element which the other does not. Although the Kentucky Supreme Court purported to rely on our decision in *Blockburger* v. *United States*, 284 U. S. 299 (1932), its ruling is directly contrary to this language from *Blockburger:*

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ." *Id.*, at 304.

Earlier this Term, we reiterated the traditional definition of the protection of the Double Jeopardy Clause of the Fifth Amendment:

> "'"It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977), quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969)." *Ohio* v. *Johnson*, 467 U. S. 493, 498 (1984).

In the present case, respondent Hamilton has neither been acquitted and subjected to a second prosecution, nor convicted and subjected to a second prosecution. The only conceivable double jeopardy protection which he can invoke is that against multiple punishments for the same offense. But we held in *Missouri* v. *Hunter*, 459 U. S. 359, 368 (1983), that the question whether punishments are "multiple" under the Double Jeopardy Clause is essentially one of legislative intent, a principle we reaffirmed in *Ohio* v. *Johnson*, *supra*, at 499, and n. 8. Here the Kentucky Legislature has given no indication that it wishes something less than the statutorily provided penalty imposed for each offense when a defendant is convicted of both rape and incest. There was, therefore, no violation of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment to the United States Constitution, entailed in the sentences imposed by the Kentucky trial court.

I believe that the decision of the Supreme Court of Kentucky is so obviously mistaken that it should be summarily reversed on the authority of *Ohio* v. *Johnson*, *supra*, and *Missouri* v. *Hunter*, *supra*, but at the very least I would grant the State's petition for certiorari, vacate the judgment below, and remand this case to the Supreme Court of Kentucky for reconsideration in the light of those cases.

No. 83-1318. GARRISON, WARDEN, ET AL. *v.* ALSTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 720 F. 2d 812.

No. 83-1321. CALIFORNIA ET AL. *v.* TENNECO OIL CO. ET AL.;
No. 83-1432. PUBLIC UTILITY COMMISSIONER OF OREGON ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;
No. 83-1433. NORTHWEST PIPELINE CORP. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;
No. 83-1442. EL PASO NATURAL GAS CO. *v.* TENNECO OIL CO. ET AL.;
No. 83-1443. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* TENNECO OIL CO. ET AL.; and
No. 83-1618. FEDERAL ENERGY REGULATORY COMMISSION *v.* TENNECO OIL CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the

consideration or decision of these petitions. Reported below: 708 F. 2d 1011.

No. 83–5614. **Mahoney** *v.* **United States.** C. A. 5th Cir. Certiorari denied. **Justice Brennan** and **Justice Marshall** would grant certiorari. Reported below: 712 F. 2d 956.

No. 83–6195. **Dobbert** *v.* **Strickland et al.** C. A. 11th Cir.;

No. 83–6326. **Sivak** *v.* **Idaho.** Sup. Ct. Idaho;

No. 83–6405. **Routly** *v.* **Florida.** Sup. Ct. Fla.;

No. 83–6611. **Gibson** *v.* **Idaho.** Sup. Ct. Idaho; and

No. 83–6653. **Paradis** *v.* **Idaho.** Sup. Ct. Idaho. Certiorari denied. Reported below: No. 83–6195, 718 F. 2d 1518; No. 83–6326, 105 Idaho 900, 674 P. 2d 396; No. 83–6405, 440 So. 2d 1257; No. 83–6611, 106 Idaho 54, 675 P. 2d 33; No. 83–6653, 106 Idaho 117, 676 P. 2d 31.

**Justice Brennan** and **Justice Marshall**, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83–7041 (A–1068). **Woolls** *v.* **Texas.** Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to **Justice White**, and by him referred to the Court, denied. Certiorari denied. **Justice Brennan** and **Justice Marshall** would grant the application and the petition. **Justice Rehnquist** took no part in the consideration or decision of this application and petition. Reported below: 665 S. W. 2d 455.

## July 10, 1984

### *Dismissal Under Rule 53*

No. 83–1923. **Louisiana Department of Transportation and Development** *v.* **Luling Industrial Park, Inc., et al.** Ct. App. La., 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 443 So. 2d 672.

## July 11, 1984

### *Miscellaneous Order*

No. A–22. **Stanley** *v.* **Kemp, Warden.** Application for stay of execution of sentence of death, presented to **Justice Powell**, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner challenges his conviction and death sentence on six colorable grounds. His stay application presenting those assignments of error did not arrive in this Court until 10:25 p. m. on July 11, 1984, less than two hours before his scheduled execution. At a minimum, I would grant a stay of sufficient duration to make possible a meaningful evaluation of petitioner's claims. In my view, the importance and irrevocability of our decision require at least that we take the time necessary to ensure that the proceedings below were as error free as humanly possible.

I dissent.

## JULY 12, 1984

### *Miscellaneous Orders*

No. A-24. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH. Application to vacate the order of the United States Court of Appeals for the Eleventh Circuit entered July 12, 1984, granting a stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. A-27. WASHINGTON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting), we would grant petitioner's application for a stay of his execution.

## JULY 18, 1984

### *Dismissal Under Rule 53*

No. 83-1897. IN RE FERNANDEZ-TOLEDO ET AL. Petition for writ of mandamus dismissed under this Court's Rule 53.

JULY 30, 1984

*Dismissal Under Rule 53*

No. 83–1248. MOBIL OIL CORP. ET AL. *v.* BATCHELDER ET AL. Sup. Ct. Kan. Certiorari dismissed as to petitioner Atlantic Richfield Co. under this Court's Rule 53. Reported below: 233 Kan. 846, 667 P. 2d 337.

JULY 31, 1984

*Dismissal Under Rule 53*

No. 83–1835. WALKER *v.* LOCKHART, SUPERINTENDENT, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 726 F. 2d 1238.

AUGUST 2, 1984

*Dismissal Under Rule 53*

No. 83–1928. STARK ET AL. *v.* ATWOOD GROUP ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 725 F. 2d 255.

*Miscellaneous Orders*

No. — — ——. CENTRAL JERSEY INDUSTRIES, INC., ET AL. *v.* UNITED STATES RAILWAY ASSN. ET AL. Statement of appellants as to dismissal of the appeal was received July 26, 1984, and presented to the Court for its consideration. The appeal from the Special Court, Regional Rail Reorganization Act of 1973, to review the final judgment entered July 23, 1984, shall not be dismissed at this time under § 303(d) of the Regional Rail Reorganization Act of 1973. The time to docket the appeal is extended to and including September 21, 1984. The application for leave to file a statement as to jurisdiction in excess of the page limitations is granted provided the statement as to jurisdiction does not exceed 40 pages. JUSTICE BRENNAN took no part in the consideration or decision of this order.

No. A–1025 (84–19). McDONALD ET AL. *v.* BURROWS, SHERIFF OF WICHITA COUNTY, TEXAS, ET AL. C. A. 5th Cir. Application for recall and stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-420. In re Disbarment of Brownlow. Disbarment entered. [For earlier order herein, see 466 U. S. 948.]

No. D-429. In re Disbarment of Cooper. Disbarment entered. [For earlier order herein, see 466 U. S. 969.]

No. D-440. In re Disbarment of Work. It is ordered that Daniel Michael Work, Jr., of Oklahoma City, Okla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-441. In re Disbarment of Mushkin. It is ordered that Morrow D. Mushkin, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-442. In re Disbarment of Sweeney. It is ordered that John J. Sweeney, Jr., of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-443. In re Disbarment of Dizak. It is ordered that Robert Earl Dizak, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-444. In re Disbarment of Sherr. It is ordered that William C. Sherr, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-445. In re Disbarment of Nicholas. It is ordered that John G. Nicholas, of Flushing, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-447. In re Disbarment of Thornell. It is ordered that Michael Thornell, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

*Rehearing Denied*

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL., 467 U. S. 310;

No. 82–432. LOCAL NO. 82, FURNITURE & PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN & PACKERS, ET AL. *v.* CROWLEY ET AL., 467 U. S. 526;

No. 82–1643. INTERSTATE COMMERCE COMMISSION ET AL. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL., 467 U. S. 354;

No. 83–904. OHIO *v.* JOHNSON, 467 U. S. 493;

No. 83–1067. MADDOX *v.* UNITED STATES, 467 U. S. 1214;

No. 83–1261. LYDDAN *v.* UNITED STATES, 467 U. S. 1214;

No. 83–1578. MERRITT *v.* GEORGIA, 467 U. S. 1241;

No. 83–1588. CRAMER *v.* STATE BAR OF MICHIGAN ET AL., 466 U. S. 974;

No. 83–1614. GOTTFRIED ET AL. *v.* UNITED STATES ET AL., 467 U. S. 1252;

No. 83–1731. COHRAN *v.* STATE BAR OF GEORGIA, 467 U. S. 1223;

No. 83–1769. BURCHE *v.* WALTERS ET AL., 467 U. S. 1242;

No. 83–1806. MCANLIS *v.* UNITED STATES ET AL., 467 U. S. 1227;

No. 83–1810. MILLER *v.* PORT OF ILWACO ET AL., 467 U. S. 1243;

No. 83–5088. GILBERT *v.* SOUTH CAROLINA, 467 U. S. 1220;

No. 83–5092. GLEATON *v.* AIKEN, WARDEN, ET AL., 467 U. S. 1220;

No. 83–5148. HIGH *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, 467 U. S. 1220;

No. 83–6090. BERRYHILL *v.* FRANCIS, WARDEN, 467 U. S. 1220;

No. 83–6614. TILLIS *v.* COOKE ET AL., 467 U. S. 1244;

No. 83–6626. COLLINS *v.* WESTERN ELECTRIC CO., INC., 467 U. S. 1254; and

No. 83–6627. ALERS *v.* PUERTO RICO ET AL., 467 U. S. 1230. Petitions for rehearing denied.

No. 83–5716. CORN *v.* ZANT, WARDEN, 467 U. S. 1220. Petition for rehearing denied. JUSTICE POWELL would defer action on the petition pending decision by the Court in No. 83–1590, *Francis* v. *Franklin* [certiorari granted, 467 U. S. 1225].

AUGUST 9, 1984

*Miscellaneous Orders*

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of petitioners to dispense with printing the joint appendix denied.

No. 83–297. ARMCO INC. *v.* HARDESTY, TAX COMMISSIONER OF WEST VIRGINIA, 467 U. S. 638. Appellant is requested to file a response to the petition for rehearing within 30 days.

No. 83–997. TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 465 U. S. 1065]; and

No. 83–1325. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 466 U. S. 926.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 83–1013. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 83–1373. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 466 U. S. 957.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 83–1045. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* PROVENZANO. C. A. 3d Cir. [Certiorari granted, 466 U. S. 926]; and

No. 83–5878. SHAPIRO ET AL. *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 7th Cir. [Certiorari granted, 466 U. S. 926.] Motion of respondent in No. 83–1045 and petitioners in No. 83–5878 for divided argument granted.

No. 83–1065. COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL.; and

No. 83–1240. NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL. C. A. 2d Cir. [Certiorari granted, 465

U. S. 1099.] Motion of petitioners for divided argument and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose.

No. 83–1084. VISTA RESOURCES, INC., ET AL. *v.* SEAGRAVE CORP. C. A. 2d Cir. [Certiorari granted, 466 U. S. 970.] Motions of Advance Ross Corp. and Ivan K. Landreth et al. for leave to file briefs as *amici curiae* granted.

*Dismissal Under Rule 53*

No. 83–1084. VISTA RESOURCES, INC., ET AL. *v.* SEAGRAVE CORP. C. A. 2d Cir. [Certiorari granted, 466 U. S. 970.] Writ of certiorari dismissed under this Court's Rule 53.

## AUGUST 16, 1984

*Miscellaneous Orders*

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Motion of National Governors' Association for leave to intervene as a party petitioner referred to the Special Master. [For earlier order herein, see, *e. g.*, 466 U. S. 948.]

No. A–37 (84–138). SOUTH CAROLINA *v.* UNITED STATES ET AL. D. C. D. C. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

*Rehearing Denied*

No. 82–1350. UNITED STATES *v.* UNITED SCOTTISH INSURANCE CO. ET AL., 467 U. S. 797;
No. 83–490. DAVIS ET AL. *v.* SCHERER, *ante*, p. 183;
No. 83–747. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* JOHNSON ET AL., 467 U. S. 925;
No. 83–916. UNITED STATES *v.* MORTON, 467 U. S. 822;
No. 83–6260. TRAVAGLIA *v.* PENNSYLVANIA, 467 U. S. 1256;
No. 83–6277. HANDY *v.* PECK, 467 U. S. 1253;
No. 83–6410. PATTERSON *v.* HEFFRON ET AL., 467 U. S. 1259;
No. 83–6567. ARNOLD *v.* SOUTH CAROLINA, 467 U. S. 1265;
No. 83–6575. PLATH *v.* SOUTH CAROLINA, 467 U. S. 1265; and
No. 83–6591. PERSHE *v.* IRIZARRY ET AL., 467 U. S. 1237.
Petitions for rehearing denied.

No. 83–6610. Barfield *v.* Harris, Superintendent, North Carolina Correctional Center for Women, et al., 467 U. S. 1210; and

No. 83–6649. Slater *v.* United States, 467 U. S. 1254. Petitions for rehearing denied.

No. 82–1005. Chevron U. S. A. Inc. *v.* Natural Resources Defense Council, Inc., et al.;

No. 82–1247. American Iron & Steel Institute et al. *v.* Natural Resources Defense Council, Inc., et al.; and

No. 82–1591. Ruckelshaus, Administrator, Environmental Protection Agency *v.* Natural Resources Defense Council, Inc., et al., 467 U. S. 837. Petition for rehearing denied. Justice Marshall, Justice Rehnquist, and Justice O'Connor took no part in the consideration or decision of this petition.

No. 83–6395. Ward *v.* General Motors Corp., 466 U. S. 961; and

No. 83–6396. Ward *v.* Equal Employment Opportunity Commission, 466 U. S. 953. Motions for leave to file petitions for rehearing denied.

## August 23, 1984

*Miscellaneous Orders*

No. A–1038 (83–6864). Tafoya et al. *v.* United States. C. A. 5th Cir. Application for stay, addressed to Justice O'Connor and referred to the Court, denied.

No. 35, Orig. United States *v.* Maine et al. Motion of New York and Rhode Island for divided argument granted. [For earlier order herein, see, *e. g.*, *ante*, p. 1213.]

No. 82–1913. Garcia *v.* San Antonio Metropolitan Transit Authority et al.; and

No. 82–1951. Donovan, Secretary of Labor *v.* San Antonio Metropolitan Transit Authority et al. D. C. W. D. Tex. [Probable jurisdiction noted, 464 U. S. 812.] Motion of the Solicitor General for divided argument granted.

No. 82–1922. Southern Motor Carriers Rate Conference, Inc., et al. *v.* United States. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motions of American Movers

Conference et al. and Edison Electric Institute for leave to file briefs as *amici curiae* granted.

No. 83–812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.; and

No. 83–929. SMITH ET AL. *v.* JAFFREE ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 466 U. S. 924.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–990. SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS ET AL. *v.* BALL ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1064.] Motion of respondents to permit Nancy L. Dilley to present oral argument *pro hac vice* denied.

No. 83–1437. MAREK ET AL. *v.* CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CHESNY. C. A. 7th Cir. [Certiorari granted, 466 U. S. 949.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–1476. UNITED STATES *v.* DANN ET AL. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1214.] Motion of American Land Title Association for leave to file a brief as *amicus curiae* granted.

No. 83–1625. UNITED STATES *v.* JOHNS ET AL. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

## AUGUST 27, 1984

*Dismissal Under Rule 53*

No. 84–37. CESSNA AIRCRAFT CO. *v.* BLEVINS. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 728 F. 2d 1576.

## AUGUST 29, 1984

*Dismissal Under Rule 53*

No. 84–8. HAZELTINE CORP. *v.* RCA CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 730 F. 2d 1440.

## AUGUST 30, 1984

*Dismissal Under Rule 53*

No. 83–2103. IN RE UNITED STATES. Petition for writ of mandamus dismissed under this Court's Rule 53.

## SEPTEMBER 4, 1984

*Miscellaneous Order*

No. A–139. KNIGHTON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Application for certificate of probable cause and stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In this application—presented to us three days after the Fifth Circuit denied an appeal from a first federal habeas petition—Knighton has applied for a stay of his execution scheduled for September 5, 1984. The stay will enable Knighton to file a full-fledged petition for certiorari. Even given the time pressures under which it was prepared, the application raises two substantial constitutional questions.

Knighton argues that his jury—which was death-qualified in accordance with *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968)—was improperly constituted because a *Witherspoon*-qualified jury is as a matter of empirical fact more inclined to convict at the guilt phase of the trial than is a jury composed of a fair cross section of the community. If Knighton is correct, he will have been convicted of a capital offense by a jury that would fail to meet our standards for neutrality in a much less serious offense.

At least one District Court has accepted a claim like that made by Knighton. *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark. 1983), appeal pending, No. 83–2113 (CA8). One other District Court accepted a similar claim, see *Keeten* v. *Garrison*, 578 F. Supp. 1164 (WDNC 1984), but was recently reversed by the Fourth Circuit, see *Keeten* v. *Garrison*, 742 F. 2d 129 (1984). Yet the District Court here did not even grant Knighton an evidentiary hearing on this point. And the Court of Appeals inexplicably affirmed the denial of Knighton's habeas petition without rejecting his argument and without deciding it. The panel held that the argument "must be directed to other fora, legislative and judicial." *Knighton* v. *Maggio*, 740 F. 2d 1344, 1351 (1984). I do not know why the panel felt unqualified to consider the issue, but Knighton—like any litigant—deserves the opportunity to be put to his proof before some competent forum. By its decision today, the Court has in effect sent him to his death without such an opportunity.

Knighton's claim of ineffective assistance of counsel also seems to me compelling. The murder with which Knighton was charged was a murder of a white proprietor by a black man in the course of a robbery. He was arrested in April and by June he was sentenced to death. Regardless whether this 2-month period could have provided sufficient preparation time even for dedicated attorneys who could singlemindedly devote themselves to the complexities of a capital case, Knighton's appointed attorney seems to have failed to take advantage of even the small amount of time that was available. He spent a shockingly small period of time—six hours in all—interviewing his client. And he seems to have spent no time at all investigating Knighton's background and character in order to put on a defense at the sentencing phase.

If the attorney had been preparing for a trial of a minor felony or some small-scale racket, this kind of preparation may have been enough, at least to meet constitutional requirements. But with his client's life at stake, this minimal effort is insufficient to meet the Constitution's demands that a capital defendant have reasonably effective representation. The failure of representation is particularly glaring in a case like this, where the defendant's previous criminal record was already before the jury, no evidence of mitigating factors seems to have been introduced, and the aggravating circumstances were exceptionally weak. Given this lack of aggravating circumstances—the only clearly valid one being that Knighton committed the murder in the course of a robbery, see *State* v. *Knighton*, 436 So. 2d 1141, 1159 (La. 1983)—Knighton could certainly make out a fair case of prejudice as well.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), and would therefore grant the application in this case. But even if I believed otherwise, I would stay the execution in this case—where the entire federal habeas proceedings have taken a little over three months, only slightly more time than a noncapital defendant is accorded just to *prepare* a petition for certiorari—so that Knighton has the opportunity to prepare a petition for certiorari and this Court has an orderly opportunity to give it fair consideration.

## SEPTEMBER 7, 1984

*Certiorari Denied*

No. 84–5378 (A–157). DOBBERT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 742 F. 2d 1274.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The State of Florida intends to electrocute the applicant Ernest John Dobbert, Jr. in several hours. Dobbert seeks a stay of his execution pending the orderly disposition of a petition for a writ of certiorari. He raises substantial issues concerning the constitutionality of his death sentence and the proper measure of federal deference to state-court factfinding under 28 U. S. C. § 2254(d). I would grant Dobbert's application and stay his execution.

### I

Dobbert was convicted in 1974 of the first-degree murder of his 9-year-old daughter Kelly. Although the jury recommended a life sentence by a vote of 10–2, the presiding judge, R. Hudson Olliff, overrode the recommendation and imposed the death sentence.

Dobbert's 13-year-old son, John III, testified at trial that he saw Dobbert kick Kelly in the stomach several times on the night before her death and that, on the subsequent evening, he saw Dobbert choke the girl until she stopped breathing. John III was "the State's key witness" at trial. *Dobbert* v. *State*, 414 So. 2d 518, 519 (Fla. 1982). There was abundant evidence that Dobbert had committed unspeakably brutal acts toward his children, but John III's testimony was the sole evidence that Dobbert had actually and deliberately strangled Kelly to death. "While the evidence presented without his testimony was adequate to convict of second-degree murder, young Dobbert's testimony supplied the sole basis for finding premeditation. There is no doubt that Dobbert inflicted injuries that caused the death of his daughter, but only through the trial testimony of young Dobbert is there evidence of his intent to cause that death." *Dobbert* v. *State*, 456 So. 2d 424, 431 (1984) (McDonald, J., dissenting in part).

In 1982, eight years after his father had been convicted and sentenced to death, John III recanted his trial testimony. His affidavit, set forth in full as an appendix to this opinion, is direct and to the point: "I did not testify truthfully about the cause of my sister Kelly's death at the trial. . . . My father did not kill Kelly." John III stated that, in fact, the "kicking incident" had occurred two weeks before Kelly's death. With respect to the fatal night, John III now states that he remembers Kelly "sitting in bed eating some soup. She started vomiting, and then choking on her own vomit and food. My father tried to give her mouth to mouth resuscitation, but it didn't work. Kelly was not killed by my father; she died accidentally, choking on food or vomit."

Why had John III earlier testified that Dobbert choked Kelly to death? First, at the time of the trial "I was still deathly afraid of my father after all I'd been through and seen, and wanted to be sure he'd be locked up where I'd be safe from him." Second, in the time leading up to and following the trial, John III was living at a children's home in Wisconsin where he was undergoing hypnosis and kept "heavily medicated" on Thorazine. Finally, "[a]lthough no one ever said it directly," John III "knew" that the staff at the children's home "wanted me to testify that my father killed my sister. I looked up to these people and wanted desperately to please them—they were good to me and concerned about me in a way I hadn't known for years."

Dobbert has twice argued in state court that his capital conviction and sentence are unconstitutional in light of John III's perjured testimony. The first time, in connection with his request to file a petition for a writ of error *coram nobis*, the Supreme Court of Florida held that John III's recantation is not "new evidence" and therefore does not deserve judicial attention. *Dobbert* v. *State*, 414 So. 2d, at 520. The court argued that, because John III had given a statement to the police after Kelly's death which contradicted the testimony he later gave at trial, defense counsel could have cross-examined the boy at trial on the inconsistencies between the earlier statement and his testimony. *Ibid.*

The second time, in connection with a motion to vacate the conviction, Circuit Judge R. Hudson Olliff held that, even in the face of the recantation, there is no "evidence or proof" to support Dobbert's claim of perjured testimony. *State* v. *Dobbert*, No. 73-5068, p. 81 (Fla. 4th Cir. Ct., May 1, 1984), aff'd, 456 So. 2d 424 (1984). Judge Olliff, who had presided over the original trial, reviewed John III's statements to the police, deposition testimony, trial testimony, and subsequent deposition testimony in a civil proceeding. Although John III's initial statements to the police contradicted his subsequent trial testimony, Judge Olliff found that the inconsistencies were easily explained away in light of the boy's terror of the father. Judge Olliff then reviewed John III's other prerecantation statements and held that they "are all consistent and each corroborates the other." Thus, he concluded, even in the face of the recantation "it is obvious that the murder conviction was not based solely—or in part—upon perjured testimony. Nor is there any evidence or proof to support [Dobbert's] allegation of perjury." *State* v. *Dobbert*, No. 73-5068, at 81. Judge Olliff made this conclusion without any discussion or analysis of John III's recantation. The Supreme Court of Florida affirmed, holding that Dobbert's claim of perjury is "without merit" because "there is no evidence or proof to support present counsel's allegation of perjury." 456 So. 2d, at 429.

Dobbert then filed a successive petition for federal habeas relief in the United States District Court for the Middle District of Florida. Although there is no question that Dobbert was not abusing the writ on this issue—John III's recantation had come *after* Dobbert's first federal petition had been denied—the District Court denied the petition because Judge Olliff had found that "even in light of the 1982 recantation John's trial testimony was not perjured. Judge Olliff found, instead, that there was 'no evidence or proof to support [petitioner's] allegation of perjury.'" 593 F. Supp. 1418, 1427 (1984). This finding, the District Court concluded, commands deference under 28 U. S. C. § 2254(d). See *Sumner* v. *Mata*, 449 U. S. 539 (1981). The Eleventh Circuit has now affirmed 2-1. 742 F. 2d 1274 (1984) (Clark, J., dissenting).

## II

Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction. For these reasons, a witness' recantation of trial testimony typically will justify a new trial only where the reviewing judge after analyzing the recantation is satisfied that it is true and that it will "render probable a different verdict." See, *e. g.*, *Brown* v. *State*, 381 So. 2d 690, 692–693 (Fla. 1980).

Dobbert argues that, notwithstanding the strong presumption against recanting testimony, the circumstances of John III's recantation in this capital case raise important constitutional issues that demand sober and measured reflection. First, although federal courts traditionally have held that a conviction supported by perjured testimony is not unconstitutional unless the prosecutor or judge knew or had reason to know that the testimony was perjured, Dobbert argues that this approach is no longer valid after *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Dobbert correctly notes a split among the Circuits concerning the authority of federal courts to grant habeas relief when "newly available evidence conclusively shows that a vital mistake ha[s] been made." *Grace* v. *Butterworth*, 586 F. 2d 878, 880 (CA1 1978). Compare *Grace* (such claims are cognizable); *United States ex rel. Sostre* v. *Festa*, 513 F. 2d 1313 (CA2) (same), cert. denied, 423 U. S. 841 (1975), with *Drake* v. *Francis*, 727 F. 2d 990 (CA11 1984) (such claims are not cognizable because habeas is not concerned with questions of guilt or innocence), rehearing en banc granted, *id.*, at 1003.

Second, Dobbert argues that the federal courts should give attention to formulating proper standards for evaluating the materiality and credibility of recantations. He notes that the need for such consideration is especially great where, as here, the recanted testimony was the *sole* evidence supporting a conviction of first-degree murder.

Dobbert argues finally that, whatever the usual procedural rules regarding the consideration of a recantation, those rules must bend in the face of the Eighth Amendment. He notes that this Court has repeatedly invalidated procedural rules that "'diminish the reliability of the guilt determination'" in capital cases, Application for Stay of Execution 16, quoting *Beck* v. *Alabama*, 447 U. S. 625, 638 (1980), and argues that Eighth Amendment scrutiny should be applied to rules barring postconviction reconsideration of guilt as well as to procedural rules employed at trial.

However we ultimately might resolve these issues after research, argument, and reflection, they certainly are not frivolous. Yet the federal courts are about to let Dobbert go to the electric chair out of misplaced deference to an unexplained, and palpably inexplicable, state-court "factual" finding that there is, in fact, no "evidence or proof" to support his claim of perjury.

### A

If Judge Olliff's "finding" that there is no "evidence" of perjury found fair support in the record, the law would mandate that the federal habeas court defer to that finding. 28 U. S. C. § 2254(d); see *Sumner* v. *Mata, supra.* But no fair-minded person could conclude on the basis of the record before us that the "finding" is plausible. It is absurd on its face. Dobbert has offered stark "evidence" of perjury—the recantation affidavit of John III. Rather than analyzing *that* evidence for its strengths and weaknesses, Judge Olliff reviewed John III's *previous* statements—statements which John III now recants—and on finding that *those* statements "are all consistent and each corroborates the other," proceeded to conclude that notwithstanding the recantation "it is obvious that the murder conviction was not based solely—or in part—upon perjured testimony. Nor is there any evidence or proof to support [the] allegation of perjury."

This "factual determination" should not stand because it most certainly is *not* "fairly supported by the record." 28 U. S. C. § 2254(d)(8). Some may choose to argue that Judge Olliff's "finding" represents an implicit rejection of the materiality and credibility of John III's recantation. Perhaps it does. Cf. *LaVallee* v. *Delle Rose*, 410 U. S. 690, 697 (1973) (in the "ordinary case," federal courts may assume that a state court which did not articulate its reasoning fairly considered the merits of the factual dispute). But Judge Olliff's asserted reasoning—that earlier statements were consistent with each other, thereby demonstrating the absolute lack of *any* "proof or evidence" of perjury—is not entitled to deference where the recantation asserts that those statements were untrue. There may well be numerous reasons why John III's recantation should not be entitled to controlling weight, but there is nothing here to suggest that Judge Olliff considered those possible reasons, let alone relied upon them in reaching his conclusion. In the face of a specific recantation of critical testimony, a court must evaluate the recantation itself and explain what it is about that recantation that warrants a conclusion that it is not credible evidence.

That Judge Olliff's rejection of the recantation was not based on any evaluation of the recantation itself is demonstrated, I believe, by the District Court's opinion. The court made an urgent effort to demonstrate that Judge Olliff's finding was related to a consideration and analysis of the recantation itself, noting, for example, that "Judge Olliff reviewed the facts depicted in John's [earlier testimony] and determined that they were much more detailed than . . . the 1982 recantation. (Olliff's Order at 63, 67)." 593 F. Supp., at 1427. Nothing in the cited pages supports the District Court's characterization of Judge Olliff's analysis; the recantation is not even mentioned in these pages. In fact, nowhere in the order does Judge Olliff compare the earlier testimony with the recantation.

The proper analysis under § 2254(d), I submit, is illustrated by a case cited with approval in *Sumner* v. *Mata* itself, see 449 U. S., at 547–548. In *Taylor* v. *Lombard*, 606 F. 2d 371 (CA2 1979), cert. denied, 445 U. S. 946 (1980), defense counsel came forward after the state conviction with an affidavit charging that key testimony had been perjured and that the prosecution nevertheless had knowingly used it. In a post-trial proceeding the state court concluded that there was "no showing" of perjured testimony. 606 F. 2d, at 374. The Second Circuit reviewed the record and concluded that the state court's finding that "there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference." *Id.*, at 375. The Second Circuit's requirement of fair support in the record was not, of course, an exercise of judicial fiat—it was required by Congress in 28 U. S. C. § 2254(d)(8). I cannot comprehend how the federal courts in this capital case can in good conscience avoid that statutory command.

I emphasize again that John III's recantation ultimately may not deserve controlling weight. But such a conclusion cannot rest upon a finding that there is no "evidence or proof" of perjury at all, especially when that clearly erroneous finding is coupled with a complete failure to analyze the recanting evidence *itself*.*

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*It might be argued that the State Supreme Court's earlier determination that John III's recantation is not "new evidence," *Dobbert* v. *State*, 414 So. 2d 518, 520 (Fla. 1982), now serves as a procedural bar to federal review. That

### B

The strong presumption against recantation testimony reflects an uneasy balance between, on the one hand, society's interest in resolving factual disputes in one proceeding and in according finality to those resolutions, and, on the other, the interests of a convicted individual and society at large in ensuring that only the guilty are punished. However the balance is ultimately struck in the ordinary criminal case, the Eighth Amendment requires that courts—state and federal—strike a special balance in the capital context. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976). See also *Beck* v. *Alabama*, 447 U. S., at 638 (normal procedural rules must give way in the capital case where they "diminish the reliability of the sentencing determination"). For this reason, the Court historically has taken special care to minimize the risk that death sentences are "imposed out of whim, passion, prejudice, or mis-

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finding should not preclude the federal courts from considering the merits of Dobbert's claim. First, the state courts themselves have failed to abide by the finding. Judge Olliff professed to consider the recantation itself and concluded that there was no "evidence or proof" of perjury, and the Supreme Court of Florida affirmed on those grounds.

Second, as Judge Olliff himself found, there were compelling reasons why Dobbert could not effectively have used John III's initially inconsistent statements to the police at trial: The inconsistencies, such as they were, could easily have been explained away; John III might well have broken down under such questioning, thereby further inflaming the jury; and such questioning would almost certainly have led to a "parade of horribles" concerning Dobbert's abuse of his children.

Finally, I believe it manifest that John III's 1982 recantation is "new" evidence. It seems obvious that it is much more powerful for John III now to state that his father did not kill his sister than it was when the boy first suggested this in 1972. At that time, John III clearly was terrified of his father and was living in a nightmare world, both of which (as Judge Olliff found) probably would have led a jury to discount the inconsistencies as part of the boy's effort to protect himself. Now that John III is a grown man and is willing to recant his trial testimony—when he has no reason to fear his father and has, we can only hope, recovered from the trauma to which he was subjected—his statements carry much more powerful force. Thus the recantation is not merely duplicative of the earlier statement.

take." *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring).

In the face of a sworn recantation from the only witness who provided testimony supporting Dobbert's conviction of first-degree murder, are we confident that there has been a reliable factual determination of his guilt, sufficient to warrant public confidence in the outcome as he proceeds to the electric chair? I believe there are compelling reasons to stay Dobbert's execution while we give this question further thought. First, no federal court addressing Dobbert's claim has yet even attempted to analyze the appropriate ground rules for considering the materiality and credibility of John III's recantation. As Dobbert has demonstrated, these are open issues that sooner or later will require our attention. Second, the sole reason for this failure has been the federal courts' mistaken invocation of 28 U. S. C. § 2254(d) in relying on Judge Olliff's "finding" that in the face of the recantation admitting perjury there is no "evidence or proof" of perjury. In the "ordinary case" it may well be appropriate to engage in all manner of tidy assumptions about what Judge Olliff "really" meant to say. Cf. *LaVallee* v. *Delle Rose*, 410 U. S. 690 (1973). But this is no ordinary case. I must conclude at this juncture that there is *no* fair support in the record for the "finding" that there is no "evidence or proof" of perjury where (a) the "finding" is absurd on its face, and (b) the "finding" has been made without *any* discussion of the merits of the recantation itself. I would submit that what really is going on in this case can be gleaned from Judge Olliff's introduction to his opinion: "This case has been pending for a longer period of time than this nation was involved in World War II and the Korean War combined." *State* v. *Dobbert*, No. 73–5068, at 2. In the face of such impatience, I believe that *any* confession by John III to perjured testimony, however strong, would in the end have made not one bit of difference.

## III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), and would therefore grant the application in this case. But even if I believed otherwise, I would stay the execution to permit for a fair and rational consideration of Dobbert's claims.

Only two men know whether Kelly Dobbert was strangled or whether she accidentally choked to death. One of them will die in several hours. The other will live with the consequences of his damning testimony for the rest of his life. Both now swear that the testimony was false. I would have thought that the federal courts would take the time to ensure that John III's recantation truly deserves no weight, or at the very least that it has received principled consideration in the state courts. This is not another mere example of "ordinary" deference to state-court factfinding. It is an outright abdication of our responsibility to minimize the risk that innocent people are put to death.

I dissent.

## APPENDIX TO OPINION OF BRENNAN, J., DISSENTING

COUNTY OF EAU CLAIRE
STATE OF WISCONSIN

### AFFIDAVIT

Ernest John Dobbert, III, being first duly sworn, deposes and says:

1. I am the son of Ernest John Dobbert, Jr., who was convicted and sentenced to death in Jacksonville, Florida in April, 1974, for the murder of my sister, Kelly Ann Dobbert. I testified as a witness against my father at his trial. I did not testify truthfully about the cause of my sister Kelly's death at the trial.

2. On Sunday, January 31, 1982, I read in the newspaper that my father was to be executed within two days. After learning of my father's execution date, I called my close personal friend and lawyer, Paul Kelly, and asked him to help me correct my untrue testimony that was responsible for my father being convicted of murdering Kelly.

3. Some of the questions asked of me at trial by Mr. Shorstein, the Assistant State Attorney, are listed below. The answers in the left column are some of the answers given at trial that were false. The true answers are listed on the right under the column designated "Correct Answer."

> Question: "Let me go back to the night before New Year's Eve. Did he [your father] do anything to Kelly the night before she died?" [T.T. 2113]

| Answer at trial: | Correct Answer: |
|---|---|
| "Yes." | "No." |

Question: "What did he do to her?" [T.T. 2113]

| Answer at trial: | Correct Answer: |
|---|---|
| "Kicked her." | "Nothing." |

The answers indicating that my father kicked Kelly the night before she died were untrue. My father did kick Kelly in much the way I described, but weeks before she died.

Question: "Did he [your father] do anything to her [Kelly] the night she died?" [T.T. 2113]

| Answer at trial: | Correct Answer: |
|---|---|
| "Choked her." | "No." |

All the answers indicating my father choked Kelly the night she died are untrue. He did not choke her that night, nor did he kill her. Her death was accidental.

4. I am making this affidavit because there are statements I made at trial that were untrue, and need correcting. I do not make this affidavit out of any great love for my father. I still have not forgiven him for the abuse that I (and my brother and sisters) suffered at his hands for the four years before Kelly died and I ran away. I have no desire to see him free. He should be in prison for the abuse to his children.

5. I read my testimony at trial again recently. Although it is accurate in parts, there are statements that are clearly false, and parts of the story came out in a way that is very misleading about what happened before Kelly's death. The story as it came out is just untrue. The trial testimony creates this story: The night before Kelly died, my father kicked her several times in the stomach. The next night, after she ate some soup, he choked her and she stopped moving. I listened to her heart, but couldn't hear a beat. My father then tried mouth to mouth resuscitation, but it didn't work.

What happened in reality was that the kicking incident occur[r]ed long before the night Kelly died, more like two weeks before she died. The night she died, she was sitting in bed eating some soup. She started vomiting, and then choking on her own vomit and food. My father tried to give her mouth to mouth resuscitation, but it didn't work. Kelly was not killed by my father; she died accidentally, choking on food or vomit.

6. I'd like to explain a little more about why I think I testified as I did at the trial, and why I'm taking action to correct it now.

At the time of the trial I was thirteen years old. I was still deathly afraid of my father after all I'd been through and seen, and wanted to be sure he'd be locked up where I'd be safe from him. I was undergoing hypnosis in a psychologist's office in Wisconsin for about a year before the trial. (The therapy ended one month after the trial.) I was hypnotized approximately two times a week for a period of time, and then about once every week thereafter. At each session, I'd be hypnotized and then asked questions about my father and how he abused us. I was later kept heavily medicated on what I was told was Thorazine, from 1972 to 1976, and then on other medication until 1978.

Although no one ever said it directly, I knew that my social worker, Mrs. Lenz, and other people on the staff at the children's home wanted me to testify that my father killed my sister. I looked up to these people and wanted desperately to please them—they were good to me and concerned about me in a way I hadn't known for years. Mrs. Lenz, in particular, influenced me. I saw her almost every day for the period before the trial. She developed some emotional difficulties herself, and began to obsess about my father.

When I finally left the institutions in 1978 and came off the medication, I thought about what I had done in testifying that Kelly was murdered when she died accidentally. Although I knew I had done something wrong, I wasn't sure what, if anything, I wanted to do about it. After awhile, I spoke to Paul Kelly, and asked him to locate and notify my father's attorneys to see what might be done. I now want to make it known that I did not testify truthfully at my father's trial, as this affidavit shows. My father did not kill Kelly.

ERNEST JOHN DOBBERT, III

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

## I

The "right" of the State to a speedy execution has now clearly eclipsed the right of an individual to considered treatment of a substantial claim that he has been sentenced to death for an offense that he did not commit. Ernest John Dobbert, Jr., raised such a claim in a federal habeas corpus petition filed on August 30, 1984, and here is the entire history of the deliberate speed with which the claim was considered: On September 3, the Federal

District Court for the Middle District of Florida denied relief, 593 F. Supp. 1418 (1984), but issued a certificate of probable cause to appeal, thereby indicating that Dobbert's petition had significant merit; three days after that, on September 6, the Court of Appeals for the Eleventh Circuit in a 2–1 vote affirmed the District Court's judgment, 742 F. 2d 1274 (1984), with the dissenting judge pleading that "there has not been enough time in which justiciably *[sic]* to decide this case;" and that very same day, at 4:40 p. m., Dobbert filed a stay application with this Court. That application asked the Court to stay his execution just long enough so that Dobbert's counsel could pause to brief properly the substantial constitutional issue raised by this case. But at 10 a. m. the next day—a scant 19 hours after Dobbert asked this Court to consider his claim and a mere 8 days after the claim was first brought before any court—Dobbert is to be executed. This is swift, but is it justice?*

There is substantial reason in this case to think it is not. Dobbert was convicted under Florida law of child abuse, child torture, second-degree murder, and the first-degree murder of his 9-year-old daughter; only the last of these carries with it the possibility of a death sentence. It is impossible to know, however, whether Dobbert actually committed the offense of first-degree murder as defined by Florida law, for the jury's verdict on this count was infected by the trial judge's repeated and invalid instruction on the scope of first-degree murder. The instruction at issue told the jury that it could convict for first-degree murder if it found that the daughter was killed by premeditated design *or* that she was killed *without premeditation* but while Dobbert was committing an "abominable and detestable crime against nature." As

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*The frenzied rush to execution that characterizes this case has become a common, if Kafkaesque, feature of the Court's capital cases. See, *e. g.*, *Wainwright* v. *Adams*, 466 U. S. 964, 965 (1984) (MARSHALL, J., dissenting) (noting the Court's "indecent desire to rush to judgment in capital cases"); *Woodard* v. *Hutchins*, 464 U. S. 377, 383 (1984) (BRENNAN, J., dissenting) (criticizing "rush to judgment" in Court's decision to vacate stay of execution); *Autry* v. *Estelle*, 464 U. S. 1, 5 (1983) (STEVENS, J., dissenting) (criticizing decision to deny stay of execution); see also *Autry* v. *McKaskle*, 465 U. S. 1085 (1984) (MARSHALL, J., dissenting); *Woodard* v. *Hutchins*, 464 U. S., at 383 (WHITE and STEVENS, JJ., dissenting); *id.* at 383–384 (MARSHALL, J., dissenting); *Barefoot* v. *Estelle*, 463 U. S. 880, 906 (1983) (MARSHALL, J., dissenting).

a matter of state constitutional law, the Florida Supreme Court, in a holding that preceded the crimes for which Dobbert was convicted, had held that the statutory term "crime against nature" is too vague to sustain a conviction. *Franklin* v. *State*, 257 So. 2d 21, 22 (1971). Dobbert was therefore found guilty after a felony-murder instruction that permitted the jury to convict him of a crime that did not exist under state law at the time of his conviction.

The jury was thus granted impermissible leeway in violation of Dobbert's federal due process rights. This fundamental defect occurred when the trial judge—no fewer than six times during the instruction phase—instructed the jury with one variant or another of the following words:

> "If a person has a premeditated design to kill one person . . . he is . . . guilty of murder in the first degree. The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree *even though there is no premeditated design or intent to kill.*" Tr., as printed in Record, Exhibit 5, p. 162 (emphasis supplied).

It is vital to understand what is put at stake by this definition of first-degree murder. First, the record offers no suggestion that the death of Dobbert's daughter occurred during an arson, rape, robbery, burglary, or kidnaping—the only underlying felonies upon which Florida has predicated the crime of felony murder and the capital penalty that attaches to it. Second, the trial judge gave no narrowing definition of the "crime against nature," and even if he had, there appears again to be absolutely no evidence that Dobbert's daughter died while Dobbert was sodomizing her—presumably the core offense to which the vague statutory term applies. See *Franklin, supra.* Third, there *was* ample evidence that Dobbert beat his daughter, and there was testimony that he kicked her in the stomach the night that she died.

From these facts it is quite plausible that the jury relied on the very vagueness for which the Florida Supreme Court had already struck down the statute to conclude that, even if Dobbert had not premeditated the killing of his daughter, he nonetheless should be convicted of first-degree murder for child abuse leading to death. I do not now question whether a State *could* create such a crime, but the indisputable fact is that Florida has not chosen to do so. Nor, as a corollary, has Florida chosen to make such an offense a capital one. Yet the jury in this case was not only permitted but invited six times to define a new capital crime to fit Dobbert's offense. This leeway, resulting from statutory vagueness, was the very defect inherent in the statutory term for which the Florida Supreme Court invalidated it.

There is simply no way to tell upon which theory—premeditation or felony murder based on a nonexistent predicate offense—the jury relied. Indeed, when the jury specifically requested to be reinstructed on the definitions of first- and second-degree murder, the trial judge compounded the error by repeating the invalid instruction: "Now, murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping." Tr., as printed in the Record, Exhibit 5, p. 184.

This is clearly error of federal constitutional magnitude. In *Stromberg* v. *California*, 283 U. S. 359 (1931), the Court announced a rule from which we have not since departed: "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U. S. 862, 881 (1983). It is also clear that *Stromberg* applies to state criminal proceedings, for *Stromberg* itself involved a state conviction. See also *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942); cf. *Zant*, *supra*, at 891–893 (WHITE, J., concurring in part and concurring in judgment) (*Stromberg* applies when jury was invited to convict on two or more grounds, one of which was not sufficient to sustain the conviction). Moreover, the State essentially concedes that *Stromberg* error was committed, for the State does not argue that there was sufficient evidence of any form of felony murder recognized by Florida law.

The real question at this stage is whether this error—which goes to the question whether Dobbert was actually found guilty of first-degree murder—casts a serious enough doubt on the integrity of the jury's verdict that the error is still reviewable at this stage of the proceedings. The instruction was not objected to at trial, nor was the erroneous instruction raised in Dobbert's first federal habeas petition. Citing these procedural derelictions of Dobbert's counsel, the courts below—both state and federal—have refused to consider the merits of the alleged *Stromberg* violation.

There are sound arguments that the alleged violation in this case is so fundamental that neither *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), nor the abuse-of-the-writ doctrine ought to be applied to allow Dobbert's execution to take place before this Court is at least provided with focused briefing. The Court has recognized that the cause-and-prejudice standard must be applied in such a way that fundamental "miscarriage[s] of justice" will meet it, see *id.*, at 91; as JUSTICE STEVENS noted in his concurrence in *Wainwright*, "if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused." *Id.*, at 95. Similarly, *Sanders* v. *United States*, 373 U. S. 1, 15 (1963), makes clear that a federal court may consider even claims raised and decided in a previous habeas petition "if the ends of justice" would thereby be served; surely the same standard or a lesser one should apply to a successive petition that raises a *new* claim, at least when that claim casts significant doubt on a defendant's guilt. See *Sanders*, *supra*, at 18–19 (A "federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits" of certain claims raised for the first time on a successive habeas petition). Lower federal courts in settings similar to the one here have applied these principles to review fundamental trial errors to which timely objections have not been made. See, *e. g.*, *Adams* v. *Murphy*, 653 F. 2d 224, 225 (CA5 1981) (reversing conviction based on nonexistent state crime despite absence of trial objection to instruction). When, as in this case, the question is the fundamental one of guilt or innocence on the indicted charge, and the case is a capital case, the argument is strong that the "ends of justice" and fundamental "miscarriage of justice" standards have been met. I would allow Dobbert to make that argument in a certiorari petition.

As the United States District Court for the Middle District of Florida acknowledged, this is a "difficult case" with regard to the question of whether the abuse-of-the-writ doctrine should apply. 593 F. Supp., at 1440. We need not resolve that "difficult" issue today, however, to decide the only issue before the Court on this stay application: whether that claim is "difficult enough" and potentially worthy enough of the Court's attention that a stay of the execution ought to be granted until certiorari papers can be filed and the Court can make a considered evaluation of the argument. Put another way, the question is whether there is a significant claim that the State cannot execute Dobbert on the basis of a conviction that may be constitutionally invalid—with respect to an issue affecting guilt or innnocence—merely because Dobbert's attorneys have not made timely objections on the point.

In sum, there is no question that Dobbert abused and tortured his children, but there is a serious question as to whether the defect in the instruction allowed the jury to bypass the question of premeditation by concluding that the girl's death resulted from Dobbert's callous and reckless beating of her. That may well make Dobbert guilty of second-degree murder in Florida, but it cannot make him guilty of first-degree murder there. Nor can it subject him to the death penalty in that State. Dobbert is certainly no innocent man, but he may well be a guilty one to whom Florida's legislators have not chosen to apply the death penalty.

## II

Because I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would in any event grant the stay application and vacate the death sentence. But I am deeply troubled by the undue dispatch with which a majority of this Court is willing to send this stay applicant, as well as a host of others, see n., *supra*, to their death. In the case of an applicant like Dobbert, who raised a substantial claim going to the question of whether he committed a capital offense, the majority's haste is particularly disquieting.

## SEPTEMBER 9, 1984

*Certiorari Denied*

No. 84-5383 (A-162). BALDWIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution, grant certiorari, and vacate the death sentence in this case.

## SEPTEMBER 17, 1984

### *Dismissal Under Rule 53*

No. 83–2026. SUMMA CORP., DBA FRONTIER HOTEL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 734 F. 2d 21.

## SEPTEMBER 18, 1984

### *Miscellaneous Orders*

No. A–1071. DUKES *v.* MARYLAND. C. A. 4th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–397. IN RE DISBARMENT OF BERGMAN. Disbarment entered. [For earlier order herein, see 465 U. S. 1002.]

No. D–415. IN RE DISBARMENT OF LUOMA. Disbarment entered. [For earlier order herein, see 466 U. S. 902.]

No. D–421. IN RE DISBARMENT OF TAYLOR. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–425. IN RE DISBARMENT OF DENEND. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–426. IN RE DISBARMENT OF PECKRON. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–431. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see 466 U. S. 969.]

No. D–433. IN RE DISBARMENT OF GRAMZA. Disbarment entered. [For earlier order herein, see 467 U. S. 1203.]

No. D–434. IN RE DISBARMENT OF SCHETTINO. Disbarment entered. [For earlier order herein, see 467 U. S. 1224.]

No. D–436. IN RE DISBARMENT OF HOWARD. Disbarment entered. [For earlier order herein, see 467 U. S. 1237.]

No. D–439. IN RE DISBARMENT OF GERZOF. Disbarment entered. [For earlier order herein, see 467 U. S. 1238.]

No. D–446. In re Disbarment of Winner. It is ordered that David Lee Winner, of Wooster, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–448. In re Disbarment of Holloway. It is ordered that Willis Walter Holloway, Jr., of Lexington, Ky., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–451. In re Disbarment of Jones. It is ordered that Rafford Eugene Jones, of Raleigh, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–1913. Garcia *v.* San Antonio Metropolitan Transit Authority et al.; and

No. 82–1951. Donovan, Secretary of Labor *v.* San Antonio Metropolitan Transit Authority et al. D. C. W. D. Tex. [Probable jurisdiction noted, 464 U. S. 812.] Motion of National League of Cities et al. for leave to participate in oral argument as *amici curiae* and for additional time for oral argument denied.

No. 82–1922. Southern Motor Carriers Rate Conference, Inc., et al. *v.* United States. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of petitioners for divided argument and for additional time for oral argument denied.

No. 82–2157. Central States, Southeast & Southwest Areas Pension Fund et al. *v.* Central Transport, Inc., et al. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1250.] Motions of Bricklayers Fringe Benefit Funds-Metropolitan Area et al., Arthur Young & Co., and National Coordinating Committee for Multiemployer Plans for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–18. Dun & Bradstreet, Inc. *v.* Greenmoss Builders, Inc. Sup. Ct. Vt. [Certiorari granted, 464 U. S. 959.]

Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 83-469. UNITED STATES *v.* YOUNG. C. A. 10th Cir. [Certiorari granted, 465 U. S. 1021.] Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument *pro hac vice* granted.

No. 83-712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Motions of New Jersey School Boards Association, National Association of Secondary School Principals, and National School Boards Association for leave to file briefs as *amici curiae* granted. Motion of National School Boards Association for leave to participate in oral argument as *amicus curiae* denied.

No. 83-1015. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* HAMPTON COUNTY ELECTION COMMISSION ET AL. D. C. S. C. [Probable jurisdiction noted, 467 U. S. 1250.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 83-1035. TENNESSEE *v.* GARNER ET AL. C. A. 6th Cir. [Probable jurisdiction noted, 465 U. S. 1098]; and

No. 83-1070. MEMPHIS POLICE DEPARTMENT ET AL. *v.* GARNER ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of The Police Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 83-1362. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.;

No. 83-1363. PARMA BOARD OF EDUCATION *v.* DONNELLY ET AL.; and

No. 83-6392. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1204.] Motions of petitioners in Nos. 83-1362 and 83-1363 for divided argument denied.

No. 83-1476. UNITED STATES *v.* DANN ET AL. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1214.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83-1660. ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* PARKER ET AL.; and

No. 83-6381. PARKER ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 1st Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General for divided argument granted.

No. 83-1708. DEAN WITTER REYNOLDS INC. *v.* BYRD. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of Securities Industry Association, Inc., et al. for leave to file a brief as *amici curiae* granted.

*Rehearing Denied*

No. 82-6935. PAYNE *v.* VIRGINIA, *ante*, p. 1062;

No. 83-850. UNITED STATES *v.* KARO ET AL., *ante*, p. 705; and

No. 83-979. CRONN *v.* UNITED STATES, *ante*, p. 1217. Petitions for rehearing denied.

No. 81-757. ALLEN *v.* WRIGHT ET AL.; and

No. 81-970. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WRIGHT ET AL., *ante*, p. 737. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 82-1771. UNITED STATES *v.* LEON ET AL., *ante*, p. 897. Petition of Sanchez and Stewart for rehearing denied.

No. 83-851. SOUTH STREET SEAPORT MUSEUM, AS OWNER OF THE BARK PEKING *v.* MCCARTHY ET AL., 465 U. S. 1078 and 466 U. S. 994. Motion for leave to file second petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 83-1321. CALIFORNIA ET AL. *v.* TENNECO OIL CO. ET AL.;

No. 83-1432. PUBLIC UTILITY COMMISSIONER OF OREGON ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

No. 83-1433. NORTHWEST PIPELINE CORP. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

No. 83-1442. EL PASO NATURAL GAS CO. *v.* TENNECO OIL CO. ET AL.;

No. 83-1443. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* TENNECO OIL CO. ET AL.; and

No. 83-1618. FEDERAL ENERGY REGULATORY COMMISSION *v.* TENNECO OIL CO. ET AL., *ante*, p. 1219. Petition for rehearing denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

SEPTEMBER 19, 1984

*Miscellaneous Orders*

No. A-205. HENRY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay, a petition for writ of certiorari, and vacate the death sentence in this case.

No. A-206. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on September 18, 1984, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE REHNQUIST would grant the application.

# AMENDMENTS OF RULES OF THIS COURT

## ORDER

It is ordered that Rule 17.2 of the Rules of the Supreme Court of the United States be amended to read as follows:

> "17.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

It is further ordered that Rule 20.1 be amended to read as follows:

> "20.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals or a decision of the United States Court of Military Appeals (see 28 U. S. C. Sec. 1259) rendered after June 1, 1984, shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days."

It is further ordered that Rule 47 be amended to read as follows:

> "47.3. An accused person petitioning for a writ of certiorari pursuant to 28 U. S. C. Sec. 1259 may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not relieved of the printing requirements under Rule 33 and is not entitled to proceed on typewritten papers except as authorized by the Court on separate motion."

The foregoing amendments shall become effective on August 1, 1984.

JULY 5, 1984

## REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1253 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

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## GARRISON, WARDEN, ET AL. *v.* HUDSON

### ON APPLICATION FOR STAY

No. A-1061 (83-2144). Decided July 6, 1984

**An application to stay the order, in habeas corpus proceedings, of the Federal District Court (as directed by the Court of Appeals) for a state-court retrial of respondent state prisoner prior to August 18, 1984, is granted pending this Court's disposition of applicants' petition for certiorari to review the Court of Appeals' judgment ordering habeas corpus relief. Respondent's scheduled retrial some six weeks before the start of this Court's October 1984 Term would effectively deprive this Court of jurisdiction to consider the petition for writ of certiorari. Moreover, the balance of harm favors applicants.**

CHIEF JUSTICE BURGER, Circuit Justice.

On June 29, 1984, applicants, the Warden and Attorney General of the State of North Carolina, filed a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. In respondent's second federal appeal concerning his murder conviction and life sentence, the Court of Appeals reversed the decision of the United States District Court for the Western District of North Carolina and directed that a writ of habeas corpus issue to release respondent from confinement if applicants fail to retry him within a reasonable time. Judgment order reported at 732 F. 2d 150 (1984). The District Court then ordered retrial prior to August 18, 1984. Applicants challenge the Court of Appeals' decision in their certiorari petition, No. 83-2144, and seek to stay the scheduled retrial until this Court acts on the petition for certiorari. Hudson filed a response to the application earlier today asserting that the decision of the Court of Appeals is correct.

The petition for certiorari would not in the normal course be acted on by this Court before the start of the October 1984 Term—some six weeks after the scheduled retrial. See this Court's Rule 22.4. Retrial of respondent by August 18, 1984, prior to the "first Monday in October" would effectively deprive this Court of jurisdiction to consider the petition for writ of certiorari. Applicants assert that their right to a review of the holding of the Court of Appeals will be extinguished if they are compelled to retry respondent on or about August 18. When, as in this case, "the normal course of appellate review might otherwise cause the case to become moot," *In re Bart*, 82 S. Ct. 675, 676, 7 L. Ed. 2d 767, 768 (1962) (Warren, C. J., in chambers), issuance of a stay is warranted. The balance of harm favors applicants; foreclosure of certiorari review by this Court would impose irreparable harm upon applicants. In contrast, a 6-week delay of the scheduled retrial would not impose an unreasonable delay on respondent who has remained in confinement under a life sentence since 1977.

I therefore grant the application for a stay of the order of the United States District Court for the Western District of North Carolina, pending disposition of the petition for writ of certiorari in No. 83-2144.

*It is so ordered.*

# CALIFORNIA *v.* HARRIS

## ON APPLICATION FOR STAY

No. A-19. Decided July 23, 1984

California's application to stay, pending disposition of its petition for certiorari, the California Supreme Court's judgment—reversing respondent's capital murder conviction and holding that the trial jury, which was empaneled by the use of a voter registration list, was not drawn from a fair cross section of the community—is denied. It is doubtful that four Members of this Court will vote to grant certiorari since it is questionable that the State, under state law, had preserved for review the issue whether the need for efficient jury selection justifies resort to such neutral lists as voter registration rolls even though they do not perfectly reflect the proportion of blacks and Hispanics in the population at large.

JUSTICE REHNQUIST, Circuit Justice.

The State of California requests that I stay, pending action by this Court on its petition for certiorari, a judgment of the Supreme Court of California that reversed the capital murder conviction of respondent. The State wishes this Court to review the holding of the California court that the jury that tried respondent was not "drawn from a fair cross section of the community" as that phrase is used in *Duren* v. *Missouri*, 439 U. S. 357 (1979), and other cases.

Respondent was tried in Los Angeles County, which at the time the jury in his case was empaneled summoned jurors by use of a voter registration list. The majority of the Supreme Court of California decided that respondent had produced credible evidence of substantial disparity between the representation of blacks and Hispanics on the voter lists, on the one hand, and their representation in the population at large, on the other. 36 Cal. 3d 36, 679 P. 2d 433 (1984). That court also concluded that the State had failed to rebut this evidence.

The State contends that the Supreme Court of California has misapplied this Court's *Duren* decision so as to find a violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class because of the failure of class members to register to vote. If I thought this issue were squarely presented by the State's application, I would grant a stay, because I think four Members of our Court would probably vote to grant certiorari to review the issue and, with California's rule requiring retrial in 60 days, the case would become moot without a stay. Whether this sort of jury selection procedure can be described as "systematically" excluding classes that do not register to vote in proportion to their numbers, and whether the need for efficient jury selection may not justify resort to such neutral lists as voter registration rolls even though they do not perfectly reflect population, see 439 U. S., at 368–370, are by no means open and shut questions under *Duren*.

The plurality opinion of the Supreme Court of California, however, says in substance that the State failed to preserve the second of these two questions in defending against respondent's appeal. The concurring opinion in that court, on the other hand, indicates disagreement with this view. While I cannot at this stage of the proceedings determine even to my own satisfaction which is the correct view of California law, I think this procedural snarl is likely to deter some Members of this Court who would wish to review the substantive issues involved in this case from voting to grant certiorari. While there appears to be no such procedural objection to the first of these two questions, I am doubtful that the "systematic" underrepresentation issue alone would attract enough votes to grant certiorari.

The State's application is accordingly denied.

# HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES v. TURNER ET AL.

ON APPLICATION FOR STAY

No. A–59 (83–1097). Decided August 10, 1984

The Secretary of Health and Human Services' application to stay, pending review by this Court, prospective enforcement of the District Court's permanent injunction (affirmed by the Court of Appeals)—which, in effect, requires state and local officials, in determining eligibility and benefits under the Aid to Families with Dependent Children (AFDC) statute, to deduct the standard work expense disregard in § 402(a)(8)(A)(ii) of the statute not from gross income but from net income, after deducting such items as federal, state, and local taxes—is granted prospectively from July 18, 1984. After this Court granted certiorari in this case, § 402(a)(8) was amended, effective July 18, 1984, and there is a high probability that the Court will interpret the amendment as rendering the District Court's injunction prospectively improper. Without a stay, the Secretary will suffer irreparable injury if she succeeds on the merits. Moreover, for purposes of this Court's Rule 44.4 "most extraordinary circumstances" are present so as to warrant the application for a stay even though the relief has not first been sought below.

JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General, on behalf of the Secretary of Health and Human Services, requests that I stay, pending review by this Court, prospective enforcement of the permanent injunction entered by the United States District Court for the Northern District of California on July 29, 1982, *Turner* v. *Woods*, 559 F. Supp. 603, and affirmed by the United States Court of Appeals for the Ninth Circuit, *Turner* v. *Prod*, 707 F. 2d 1109 (1983). The issue before the District Court was whether the $75 standard work expense disregard in § 402(a)(8)(A)(ii) of the Aid to Families with Dependent Children (AFDC) statute, 42 U. S. C. § 602(a)(8)(A)(ii) (1976 ed., Supp. V), is deducted from net income or gross income in determining AFDC eligibility and benefits. That court concluded that the disregard was intended by Congress to be deducted from net income, and it entered a permanent injunction prohibiting state and federal officials

> "from including mandatory payroll deductions such as federal, state and local income taxes, Social Security taxes (F. I. C. A.) and state disability insurance within the definition of 'income' in interpreting and applying that term as used in Section 602(a)(7)(A) of Title 42 of the United States Code [§ 402(a)(7)(A) of the AFDC statute]." 559 F. Supp., at 616.

The Ninth Circuit's affirmance of the District Court's interpretation is in conflict with decisions of the Third and Fourth Circuits, causing a significant disparity in the treatment of AFDC beneficiaries based solely on residence. This Court granted the Secretary's petition for a writ of certiorari to resolve the conflict. 465 U. S. 1064 (1984).

Subsequently, on July 18, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. 98–369, 98 Stat. 494. Section 2625(a) of that Act, entitled "Clarification of Earned Income Provision," amends § 402(a)(8) of the AFDC statute to provide that "in implementing [§ 402(a)(8)] the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." This amendment became effective on the date of enactment.

The Secretary argues in her application for a stay that Congress has resolved, at least from the date of enactment of this amendment forward, the precise issue on which we granted certiorari. In their memorandum in opposition to the Secretary's application for a stay, which I requested, the AFDC respondents argue that the Deficit Reduction Act, while resolving the meaning of "earned income" in § 402(a)(8), does not resolve the meaning of "income" in § 402(a)(7)(A) and thus does not overrule, prospectively, the interpretation of the Ninth Circuit on the ultimate issue of whether the $75 standard work expense disregard is deducted from net income or gross income. In my judgment, respondents' position is wrong. The Conference Report to the Deficit Reduction Act refers specifically to the conflict between the Ninth Circuit on the one hand and the Third and Fourth Circuits on the other, including the fact that this Court has agreed to hear the Ninth Circuit case, and states that the Act

> "[a]mends the AFDC statute to make clear that the term 'earned income' means the gross amount of earnings, prior to the taking of payroll or other deductions." H. R. Conf. Rep. No. 98-861, pp. 1394-1395 (1984).

From the Report's discussion, it seems clear to me that Congress intended the amendment of § 402(a)(8) to resolve the conflict, at least for the future, on the issue on which we granted certiorari. I do not see how this discussion is either confusing or ambiguous, as claimed by respondents.

The Secretary has made out a compelling case for a prospective stay. Effective July 18, 1984, she is unambiguously directed by statute to deduct the work expense disregard from gross income, prior to any deductions for taxes or for any other purposes; yet she is still subject to an injunction prohibiting her from doing the same. When this Court decides the merits of the Ninth Circuit decision affirming the injunction, which was based on the statute as it stood prior to the Deficit Reduction Act, the Court will probably also decide the validity of the injunction after the effective date of the Act. As is evident from the discussion above, I think there is a high probability that the Court will determine, as urged by the Secretary in this application, that the injunction is prospectively improper and should be dissolved as to AFDC eligibility and benefit determinations subject to the July 18, 1984, amendment. I express no opinion on the merits prior to the effective date of the Deficit Reduction Act.

I also conclude that without a stay the Secretary will suffer irreparable injury. If she succeeds on the merits, which I am confident she will as to the future interpretation of the work expense disregard, the continued application of the injunction will result in approximately $2.6 million in improper

AFDC payments each month, divided equally between the Federal Government and the State of California, a figure which respondents apparently concede. Should the Secretary ultimately lose on this issue, respondents and others so entitled will be able to collect back AFDC payments that would have been made but for the requested stay. On the other hand, it is extremely unlikely that the Secretary would be able to recover funds improperly paid out. See *Edelman* v. *Jordan*, 414 U. S. 1301, 1302–1303 (1973) (REHNQUIST, J., in chambers). A stay is, therefore, appropriate.

Finally, the individual respondents cite this Court's Rule 44.4, which provides that an application for a stay to a Justice "shall not be entertained, except in the most extraordinary circumstances," unless the relief requested has first been sought below, and argue that there are no extraordinary circumstances present in this case. They further cite my opinions in *Conforte* v. *Commissioner*, 459 U. S. 1309 (1983) (in chambers), and *Dolman* v. *United States*, 439 U. S. 1395 (1978) (in chambers), where stays were denied in part for failure to apply first for a stay in the lower courts. In *Conforte* there was no reasonable probability that certiorari would have been granted, and the applicant had not shown any legitimate reason, let alone extraordinary circumstances, for not seeking a stay in the Court of Appeals. In *Dolman* the information presented to me in the application for a stay was sketchy as to whether the applicants had requested a stay below, and there was no apparent reason for not requesting such a stay below.

The situation in the instant case is quite different. The reason for requesting a stay arose only after this Court granted certiorari and was not available when the case was before the lower courts. The Secretary contends that because certiorari had been granted, it was doubtful that either the District Court or the Court of Appeals had the authority to modify the injunction. I agree with the Secretary that such doubt exists; and whether or not an application to one of the lower courts would have been proper under the circumstances, I believe an application directly to this Court is not improper.

I think there are compelling reasons to grant immediate relief. With respect to the future propriety of the injunction, the Secretary is almost certain to prevail on the merits, because of the intervening congressional action. Every day the injunction remains in force the clearly expressed intent of Congress is being frustrated, and public funds are being improperly expended without realistic possibility of recovery at the rate of $2.6 million per month. It would be an empty and costly formality to force the Secretary to refile her application in the lower courts. In my judgment, the "most extraordinary circumstances" requirement of Rule 44.4 is met in the unusual circumstances of this case.

The application for a stay of the District Court injunction is granted prospectively from July 18, 1984.

# UHLER ET AL. *v.* AMERICAN FEDERATION OF LABOR–CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL.

## ON APPLICATION FOR STAY

No. A–137. Decided September 7, 1984

An application to stay the California Supreme Court's mandate prohibiting the placement on the State's November 1984 ballot of an initiative that would require the California Legislature (or the California Secretary of State) to request Congress to call a Constitutional Convention for the purpose of amending the Federal Constitution to require a balanced federal budget, is denied. The California Supreme Court ruled that the proposed initiative would violate both the Federal and State Constitutions, and a majority of this Court would probably conclude that there was an adequate and independent state ground for the state court's decision. Moreover, applicants' "political question" claim probably would not be viewed as raising a substantial federal question.

JUSTICE REHNQUIST, Circuit Justice

Applicants ask that I stay a mandate of the Supreme Court of California prohibiting the placement on California's November 1984 ballot of a proposed "balanced federal budget statutory initiative." The initiative would have required the California Legislature to request Congress to call a Constitutional Convention for the purpose of amending the United States Constitution to require a balanced federal budget. If the legislature failed to act, the initiative would have directed the California Secretary of State, the nominal respondent in this case, to apply directly to Congress in behalf of the State's voters. At present, 32 of the necessary 34 States have formally applied to Congress to convene such a Constitutional Convention.

The Supreme Court of California ruled at the behest of respondents, the American Federation of Labor–Congress of Industrial Organizations et al., who filed an original action in that court challenging the legality of the initiative under both state law and the United States Constitution. The constitutional provision at issue is that part of Article V which states that "[t]he Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."

The California court undertook to decide two clearly federal questions relating to the meaning of the word "Legislatures" in the above clause: (1) whether that word encompasses the voters of a State who have power to enact laws by initiative, and (2) whether it includes a legislature not acting as an independent body, but forced to act by exercise of the initiative power. The court answered each of these questions in the negative, concluding that the word "Legislatures" means the State's lawmaking body of elected representatives, acting independently of restrictions imposed by state law. These federal questions are important and by no means settled; however, because the California court went on to hold the proposed initiative invalid on independent state-law grounds, I am satisfied that a majority of this Court would conclude that there is an adequate and independent state ground for the California court's decision.

After a detailed analysis of California law and a discussion of the treatment of similar questions by other state courts, the Supreme Court of California decided that important portions of the proposed initiative were not "statutes," as that term is used in the California Constitution, but were "resolutions," and were therefore not a proper subject of the initiative process under the California Constitution. *AFL-CIO* v. *Eu*, 36 Cal. 3d 687, 686 P. 2d 609 (1984). We have long held that we will not review state-court decisions such as this, largely for the reason that decisions on the federal questions in such cases would amount to no more than advisory opinions. See *Michigan* v. *Long*, 463 U. S. 1032, 1037-1039 (1983); *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126 (1945).

Applicants urge that the foregoing construction of the California initiative provision, although denominated a state-law question by the California Court, is actually a "political question" as a matter of federal law and therefore not subject to decision on the merits by a state court. Applicants base their "political question" claim on the decision of this Court in *Coleman* v. *Miller*, 307 U. S. 433 (1939). In that case four Justices of this Court adopted the position that the Court lacked jurisdiction to rule on questions arising in connection with the ratification of a constitutional amendment because all such questions were "political" in nature. But that position did not command a majority in *Coleman*, *supra*, and however this Court would presently resolve the issues raised in the *Coleman* case, I do not think a majority would subscribe to applicants' expansive reading of the "political question" doctrine in connection with the amending process. Acceptance of applicants' arguments would, in effect, mean that courts in the State of California or elsewhere would be powerless to prevent the placing on the ballot of initiative measures designed to play a part in the process of amending the United States Constitution even though such initiative proposals clearly did not comply with state requirements as to the necessary number of signatures, time of filing, and the like. In the light of later discussions of the "political question" doctrine in cases such as *Powell* v. *McCormack*, 395 U. S. 486 (1969), and *Baker* v. *Carr*, 369 U. S. 186 (1962), I simply do not think this Court would believe that applicants' claim in this regard raises a substantial federal question. See also *Dyer* v. *Blair*, 390 F. Supp. 1291 (ED Ill. 1975) (three-judge court).

The application for a stay is accordingly denied.

# MONTGOMERY ET AL. *v.* JEFFERSON ET AL.

## ON APPLICATION FOR STAY

No. A–166. Decided September 10, 1984

An application to stay enforcement of orders of the Federal District Court, which—after holding unconstitutional as applied a requirement under the New York election law that the cover sheet of a candidate's designating petition state the number of signatures in the petition—directed that the New York City Board of Elections accept respondents' designating petitions and place their names on the ballot for the imminent Democratic primary election in Kings County, is denied under the circumstances of the case.

JUSTICE MARSHALL, Circuit Justice.

Applicants request that I stay enforcement of two orders of the United States District Court for the Eastern District of New York concerning tomorrow's Democratic primary election in Kings County, N. Y. In those orders, the District Court directed the Board of Elections in the City of New York to accept the designating petitions of respondents Jefferson and Clark and to place their names on the Democratic primary ballot.

The underlying litigation arose out of challenges to the designating petitions of Jefferson and Clark filed with the Board of Elections. On August 28, 1984, the New York Court of Appeals held that the petitions were invalid under state law because their cover sheets overstated the number of signatures in the petitions. Jefferson and Clark then challenged the constitutionality of the New York election law's requirement that a designating petition's cover sheet state the number of signatures in the petition. On September 6, the District Court held the requirement unconstitutional as applied. Thus, it ordered that Jefferson's and Clark's names be placed on the ballot. On September 7, it denied applicants' motion for a stay.

Applicants then moved for a stay and for expedited appeal in the United States Court of Appeals for the Second Circuit. Today, the Second Circuit denied the motion for a stay but granted the motion for expedited appeal. It scheduled oral argument for the week of September 24.

This application was filed at approximately 3:30 p. m. today. Given the little time left for evaluating, before tomorrow's primary, the questions raised by the application, I am not persuaded to interfere with the actions of the Second Circuit.

The application for a stay is accordingly denied.

*It is so ordered.*

# NATIONAL FARMERS UNION INSURANCE COMPANIES ET AL. *v.* CROW TRIBE OF INDIANS ET AL.

## ON APPLICATION FOR STAY

No. A–123 (84–320). Decided September 10, 1984

On application to stay the Court of Appeals' mandate, which reversed the District Court's judgment enjoining respondent Crow Tribe of Indians from executing on the Crow Tribal Court's default judgment against applicant School District—the District Court having held that the Tribal Court lacked subject-matter jurisdiction of an action brought against the School District by respondent schoolchild (a Crow Indian) for personal injuries sustained on the School District's land located within the Crow Indian Reservation—a temporary stay that was granted earlier by the Circuit Justice is continued pending this Court's disposition of applicants' petition for certiorari. It appears (1) that four Members of this Court will vote to grant certiorari to review the question whether the Court of Appeals was correct in holding that litigants, seeking to challenge an Indian tribal court's exercise of jurisdiction in a civil action, have no federal-court remedy, and (2) that applicants have a reasonable probability for success on the merits with regard to such issue. This Court's Rule 44.2, requiring that a supersedeas bond accompany the motion for a stay "[i]f the stay is to act as a supersedeas," is not applicable here, since the federal-court proceedings did not seek direct review of the Tribal Court judgment, but instead sought only collateral relief.

JUSTICE REHNQUIST, Circuit Justice.

Applicants National Farmers Union Insurance Cos. and Lodge Grass School District No. 27 request that I stay the mandate of the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the United States District Court for the District of Montana. The latter court had enjoined the Crow Tribe of Indians from executing against the applicants on a judgment rendered by the Crow Tribal Court. The Court of Appeals for the Ninth Circuit held, as I read its opinion, that litigants who seek to challenge the exercise of jurisdiction by an Indian tribal court in a civil action have no federal-court remedy of any kind. I have concluded that four Members of this Court are likely to vote to grant the applicants' petition for certiorari, and that the applicants have a reasonable probability for at least partial success on the merits if this Court grants certiorari. I have therefore decided that the temporary stay I earlier granted on August 21, 1984, pending consideration of a response, should be continued until this Court disposes of the applicants' petition for certiorari which was filed on August 29th.

In May 1982, Leroy Sage, a Crow Indian schoolchild, was struck by an uninsured motorcyclist on the property owned by applicant School District. The school is located on land within the external boundaries of the Crow Indian Reservation, but the land is owned by the State of Montana in fee subject to a reserved mineral interest in the Tribe. Sage sustained a broken leg, and filed suit against the School District in Crow Tribal Court.

Dexter Falls Down served process for Sage upon Wesley Falls Down; Wesley was a member of the school board. Wesley did not notify anyone of the summons and a default judgment for $153,000 was entered against the school three weeks later in Tribal Court. Actual medical bills came to $3,000. Applicants became aware of the suit when the Tribal Court mailed a copy of the judgment to the school. Instead of seeking review of the default judgment in Tribal Court, applicants filed suit in the United States District Court for the District of Montana, alleging that the Tribal Court's exercise of jurisdiction violated due process and the Indian Civil Rights Act of 1968, 82 Stat. 77, as amended, 25 U. S. C. § 1301 *et seq.* Applicants sought a permanent injunction against the execution of the Tribal Court judgment.

The District Court held that applicants' complaint, based on federal common law, stated a claim under 28 U. S. C. § 1331. 560 F. Supp. 213, 214–215 (1983). The District Court held that the Tribal Court lacked subject-matter jurisdiction over Sage's claim, because the land upon which the tort had occurred was not Indian land, and the defendants were not tribal members. The District Court relied on our decision in *Montana* v. *United States*, 450 U. S. 544, 565–566 (1981), in reaching this conclusion.

The Tribe appealed to the Court of Appeals for the Ninth Circuit, and that court reversed over a partial dissent. 736 F. 2d 1320, 1322 (1984). The Court of Appeals reasoned on the authority of one of its prior decisions that "Indian tribes are not constrained by the provisions of the fourteenth amendment." It went on to determine that tribes are bound by the provisions of the Indian Civil Rights Act, 25 U. S. C. § 1301 *et seq.*, and that § 202(8) of this Act, 25 U. S. C. § 1302(8), requires that tribal courts exercise their jurisdiction in a manner consistent with due process and equal protection. But the court then concluded that since Congress had expressly limited federal-court review of a claimed violation of the ICRA to a single remedy—the writ of habeas corpus—there could be no federal-court review of any tribal court exercise of jurisdiction in a civil case. The Court of Appeals for the Ninth Circuit relied in part on our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 66–70 (1978), to reach this conclusion. The Court of Appeals recognized that our decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), had relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction, but decided that our opinion the same Term in *Santa Clara Pueblo*, *supra*, suggested a restriction on federal-court review of Indian tribal jurisdiction as a result of the ICRA. The Court of Appeals observed in a footnote that "[s]hould Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the tribal court's jurisdiction in the collateral proceedings. *See generally Durfee* v. *Duke*, 375 U. S. 106 . . . (1963)." 736 F. 2d, at 1324, n. 6.

It is clear from proceedings in this case subsequent to the handing down of the opinion of the Court of Appeals that the respondents in this case have no intention of resorting to any state-court proceedings in order to enforce the judgment of the Crow Tribal Court. After the issuance of the mandate of the Court of Appeals, tribal officials, at the behest of respondent Sage, seized 12 computer terminals, other computer equipment, and a truck from the School District. The basis for this seizure was said to be the Tribal Court judgment, and no state process was invoked.

If the Court of Appeals is correct in the conclusions which it drew in its opinion, the state of the law respecting review of jurisdictional excesses on the part of Indian tribal courts is indeed anomalous. The Court of Appeals may well be correct that tribal courts are not constrained by the Due Process or Equal Protection Clauses of the Fourteenth Amendment; long ago, this Court said in *United States* v. *Kagama*, 118 U. S. 375, 379 (1886), and repeated the statement as recently as *Oliphant* v. *Suquamish Indian Tribe*, *supra*, at 211:

> "'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or the States of the Union. There exist in the broad domain of a sovereignty but these two.'"

But if because only the National and State Governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess. Every final decision of the highest court of a State in which such a decision may be had is subject to review by this Court on either certiorari or appeal. 28 U. S. C. § 1257. Every decision of a United States district court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. §§ 1252–1254; cf. § 1291. If the courts of the States, which in common with the National Government exercise the only true sovereignty exercised within our Nation, *Kagama*, *supra*, are to have their judgments reviewed by this Court on a claim of erroneous decision of a federal question, it is anomalous that no federal court, to say nothing of a state court, may review a judgment of an Indian tribal court which likewise erroneously decides a federal question as to the extent of its jurisdiction. See *Montana* v. *United States, supra.* It may be that Congress could provide for such a result, but I have a good deal more doubt than did the Court of Appeals that it has done so.

Our decision in *Santa Clara Pueblo* v. *Martinez, supra,* which the Court of Appeals read to support its conclusion, raised the question of whether a federal court could pass on the validity of an Indian Tribe's ordinance denying membership to the children of certain female tribal members. We held that the ICRA did not imply a private cause of action to redress violations of the statutory Bill of Rights contained in the Act, and that therefore the validity of the tribal ordinance regulating membership could not be reviewed in federal court. It seems to me that this holding, relating as it did to the relationship between the right of a Tribe to regulate its own membership and the claims of those who had been denied membership, is quite distinguishable from a claim on the part of a non-Indian that a tribal court has exceeded the bounds of tribal jurisdiction as enunciated in such decisions of this Court as *Montana* v. *United States, supra.* As JUSTICE WHITE pointed out in his dissent in *Santa Clara Pueblo* v. *Martinez,* 436 U. S., at 72, "[t]he declared purpose of the Indian Civil Rights Act . . . is 'to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.'" But as the Court also pointed out in its opinion, Congress entertained the additional purpose of promoting "the well-established federal 'policy of furthering Indian self-government.'" *Id.,* at 62. The facts as well as the holding of *Santa Clara Pueblo, supra,* satisfy me that Congress' concern in enacting the ICRA was to enlarge the rights of individual Indians as against the tribe while not unduly infringing on the right of tribal self-government. The fact that no private civil cause of action is to be implied under the ICRA, *Santa Clara Pueblo, supra,* does not to my mind foreclose the likelihood that federal jurisdiction may be invoked by one who claims to have suffered from an excess beyond federally prescribed jurisdictional limits of an Indian tribal court on the basis of federal common law. See, *e. g., Illinois* v. *City of Milwaukee,* 406 U. S. 91, 99–100 (1972). We said in *Oliphant* v. *Suquamish Indian Tribe,* 435 U. S., at 206:

> "'Indian law' draws principally on the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

I think a fair reading of all of our case law on this subject could lead to the conclusion that even though the ICRA affords no private civil cause of action to one claiming a violation of its terms, "Indian law" as of the time that law was enacted afforded a basis for review of tribal-court judgments claimed to be in excess of tribal-court jurisdiction.

Respondents insist that under Rule 44.2 of this Court a supersedeas bond should have accompanied applicants' request for a stay. That Rule provides:

> "If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court, or Justice may require."

I do not think that the Rule is by its terms applicable to this case. The term "supersedeas" to me suggests the order of an appellate court having authority to review on direct appeal the judgment which is superseded. All of the proceedings in the various federal courts in this case have, of course, sought no direct review of the Tribal Court judgment, which simply is not provided for by statute at all, but collateral relief. The District Court did not review the judgment of the Indian Tribal Court by way of appeal, but instead enjoined its enforcement.

It may well be that under the Federal Rules of Civil Procedure respondents would have a plausible argument to make to the District Court that an injunction bond serving somewhat the same purposes as a supersedeas bond should be required by that court so long as its injunction remains in effect. Whether such a bond should be required of either party in this case, and whether in particular it should be required of applicant Lodge Grass School District No. 27 in view of the fact that apparently under Montana law a public body is not required to post a supersedeas bond in a state-court proceeding, is an issue best left in the first instance to the District Court.

As to whether, if I am right in thinking that this Court may well decide that tribal-court judgments are subject to federal-court review for claims of jurisdictional excess, applicants would necessarily prevail, I express no opinion. The District Court held in their favor on this point, but the Court of Appeals for the Ninth Circuit found no necessity for reaching it since it held that there was no federal jurisdiction to consider it. The District Court in its opinion quoted F. Cohen, Handbook of Federal Indian Law 253 (1982), to the effect that "'the extent of Tribal civil jurisdiction over the non-Indian is not fully determined.'" 560 F. Supp., at 218. The District Court, in reaching the conclusion it did, relied on the following language from our opinion in *United States* v. *Montana:*

> "To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation,

> licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 565–566.

The court concluded that exercise of tribal jurisdiction over an injury to a tribal member occurring on non-Indian-owned fee land within the boundaries of the reservation was not within the description of Indian tribal jurisdiction. I express no opinion as to what the correct answer to this inquiry may be. I do think its correct decision is of far less importance than the correct decision of the more fundamental question of whether there is any federal-court review available to non-Indians for excesses of tribal-court jurisdiction.

*It is so ordered.*

# WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL.

## ON APPLICATION FOR STAY

No. A–214. Decided September 27, 1984

An application to stay the District Court's injunction prohibiting on constitutional grounds the enforcement of 38 U. S. C. §§ 3404 and 3405—which forbid the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with a claim for monetary benefits under laws administered by the Veterans Administration—is granted pending applicants' timely filing of a jurisdictional statement and the disposition of the same by this Court. Respondents' contention that the balance of hardships militates against the granting of a stay is not persuasive under the circumstances of the case.

JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I stay an injunction issued by the United States District Court for the Northern District of California prohibiting on constitutional grounds the enforcement of 38 U. S. C. §§ 3404 and 3405. These sections prohibit the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with a claim for monetary benefits under laws administered by the Veterans Administration.

The statute which the single District Judge found unconstitutional has been on the books in some form for 122 years. Within the past decade, this Court has summarily affirmed a decision of a three-judge District Court upholding the constitutionality of 38 U. S. C. § 3404(c). *Gendron* v. *Levi*, 423 U. S. 802 (1975), aff'g *Gendron* v. *Saxby*, 389 F. Supp. 1303 (CD Cal.). The Court of Appeals for the Ninth Circuit has also recently upheld the validity of § 3404(c). *Demarest* v. *United States*, 718 F. 2d 964 (1983), cert. denied, 466 U. S. 950 (1984).

The application for a stay is granted. Respondents urge that the balance of hardships militates against the granting of a stay. It would take more than the respondents have presented in their response, however, to persuade me that the action of a single District Judge declaring unconstitutional an Act of Congress that has been on the books for more than 120 years should not be stayed pending consideration of the jurisdictional statement of applicants by this Court. The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships. *Marshall* v. *Barlow's, Inc.*, 429 U. S. 1347 (1977) (REHNQUIST, J., in chambers).

The application for a stay is accordingly granted pending the timely filing of a jurisdictional statement and the disposition of the same by this Court.

# STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1981, 1982, AND 1983

| | ORIGINAL | | | PAID | | | IN FORMA PAUPERIS | | | TOTALS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Terms | 1981 | 1982 | 1983 | 1981 | 1982 | 1983 | 1981 | 1982 | 1983 | 1981 | 1982 | 1983 |
| Number of cases on dockets | 22 | 17 | 18 | 2,935 | 2,710 | 2,688 | 2,354 | 2,352 | 2,394 | 5,311 | 5,079 | 5,100 |
| Number disposed of during terms | 6 | 3 | 7 | 2,390 | 2,190 | 2,148 | 2,037 | 2,008 | 1,985 | 4,433 | 4,201 | 4,140 |
| Number remaining on dockets | 16 | 14 | 11 | 545 | 520 | 540 | 317 | 344 | 409 | 878 | 878 | 960 |

| | TERMS | | |
|---|---|---|---|
| | 1981 | 1982 | 1983 |
| Cases argued during term | 184 | 183 | 184 |
| Number disposed of by full opinions | 170 | 174 | 174 |
| Number disposed of by per curiam opinions | 10 | 6 | 6 |
| Number set for reargument | 4 | 3 | 4 |
| Cases granted review this term | 212 | 183 | 152 |
| Cases reviewed and decided without oral argument | 134 | 135 | 86 |
| Total cases to be available for argument at outset of following term | 126 | 113 | 80 |

JULY 9, 1984

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**ANTITRUST ACTS.**

*Sherman Act—Televising football games—Validity of college association's plan.*—Section 1 of Sherman Act was violated by petitioner National Collegiate Athletic Association's plan for televising football games involving (1) exclusive contracts with television networks, (2) limitation of total number of televised games and number of games that a member college could televise, and (3) prohibition of sale of television rights by a member college except in accordance with plan. National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., p. 85.

**APARTMENT SEARCHES.** See **Constitutional Law,** IX, 6.

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**ATTORNEY'S FEES.** See also **Education of the Handicapped Act; Stays,** 2.

*Handicapped child—Wrongful denial of special education—State officials' liability for fees.*—Where (1) petitioners, a handicapped child and his parents, who were informed that child's placement in a special education program would no longer be funded, sought relief both in state administrative proceedings and in a suit in Federal District Court against school officials, (2) grounds asserted for court relief included state law, Education of the Handicapped Act, Rehabilitation Act of 1973, and 42 U. S. C. § 1983 with respect to certain federal constitutional claims, and (3) court held that petitioners were entitled to relief under state law, petitioners could not recover attorney's fees, under 42 U. S. C. § 1988, Rehabilitation Act, or Education of the Handicapped Act, for counsel's time spent in state administrative proceedings. Smith v. Robinson, p. 992.

**"BALANCED BUDGET" AMENDMENT.** See **Stays,** 6.

**BALLOTS.** See **Stays,** 3, 6.

**BANK HOLDING COMPANY ACT OF 1956.**

*Acquisition of nonbanking affiliate—Federal Reserve Board's approval.*—Federal Reserve Board has authority under § 4(c)(8) of Act to authorize a bank holding company to acquire a nonbanking affiliate engaged principally in retail securities brokerage; Board's determination that such an acquisition is not prohibited by § 20 of Glass-Steagall Act is reasonable and deserves judicial deference. Securities Industry Assn. v. Board of Governors, FRS, p. 207.

**BANKING ACT OF 1933.** See also **Bank Holding Company Act of 1956.**

*"Securities"—Commercial paper.*—Under Act's provisions prohibiting commercial banks from underwriting or marketing "securities," commercial paper of a corporation is a "security" and therefore is subject to Act's proscriptions. Securities Industry Assn. v. Board of Governors, FRS, p. 137.

**"BEEPER" SEARCHES.** See **Constitutional Law, IX, 3.**

**BILLS OF ATTAINDER.** See **Constitutional Law, I.**

**BURDEN OF PROOF AS TO MALICE.** See **Habeas Corpus.**

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**CATHETERIZATION OF HANDICAPPED CHILD.** See **Education of the Handicapped Act.**

**CIVIL RIGHTS ACT OF 1866.** See **Statutes of Limitations.**

**CIVIL RIGHTS ACT OF 1871.** See also **Attorney's Fees; Statutes of Limitations.**

*Discharge of public employee—Qualified immunity of public official.*—In an action under 42 U. S. C. § 1983, a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome a defendant government official's qualified immunity only by showing that those rights were clearly established at time of conduct at issue; no such showing was made by appellee, alleging a violation of his Fourteenth Amendment due process rights with respect to his discharge from employment by Florida Highway Patrol without a formal pretermination or a prompt posttermination hearing. Davis v. Scherer, p. 183.

**CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.** See **Attorney's Fees.**

**COLLEGE FOOTBALL GAME TELECASTS.** See **Antitrust Acts.**

**COMMERCE CLAUSE.** See **Constitutional Law,** II; VI, 3.

**COMMERCIAL BANKS.** See **Banking Act of 1933.**

**COMMERCIAL PAPER AS CONSTITUTING "SECURITIES."** See **Banking Act of 1933.**

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**CONSTITUTIONAL LAW.** See also **Attorney's Fees; Civil Rights Act of 1871; Criminal Law,** 2, 3; **Habeas Corpus; National Labor Relations Act; Standing to Sue; Stays,** 2, 3, 5, 6; **Trading with the Enemy Act.**

**I. Bills of Attainder.**

*Draft registration—Prerequisite for student loan.*—Section 12(f) of Military Selective Service Act, which denies federal financial assistance under Title IV of Higher Education Act of 1965 to male students between certain ages who fail to register for draft, and which requires applicants for Title IV assistance to file a statement with their educational institution attesting to their compliance with Military Selective Service Act and implementing regulations, is not an unconstitutional bill of attainder. Selective Service System v. Minnesota Public Interest Research Group, p. 841.

**II. Commerce Clause.**

*Wholesale liquor sales—Validity of state tax.*—Hawaii's exemption of certain locally produced alcoholic beverages from its excise tax on wholesale liquor sales violated Commerce Clause and was not saved by Twenty-first Amendment; appellant liquor wholesalers, who sold to retailers at wholesale price plus tax, had standing to challenge tax even though they passed tax on to their customers. Bacchus Imports, Ltd. v. Dias, p. 263.

**III. Double Jeopardy.**

1. *Jurors' inability to agree—Retrial.*—Where (1) petitioner was indicted on three counts of federal criminal violations, (2) jury acquitted him on one count but could not agree on other counts, and (3) District Court declared a mistrial as to remaining counts and scheduled a retrial, petitioner had no valid double jeopardy claim so as to bar a retrial, regardless of sufficiency of evidence at his first trial. Richardson v. United States, p. 317.

2. *Murder conviction—Subsequent robbery prosecution.*—Double Jeopardy Clause barred state-court prosecution and conviction of petitioner for lesser included offense of robbery that followed his prior conviction for

**CONSTITUTIONAL LAW**—Continued.

capital murder committed during perpetration of such robbery. Payne v. Virginia, p. 1062.

**IV. Due Process.**

1. *Grand jury—Discrimination in selection of foreman.*—Assuming that discrimination against Negroes and females entered into selection of federal grand jury foreman, such discrimination did not warrant reversal of petitioner's conviction and dismissal of indictment on asserted ground that discrimination violated his due process right to fundamental fairness. Hobby v. United States, p. 339.

2. *Pretrial detainees—Contact visits—Cell searches.*—A county jail's prohibition of all contact visits between pretrial detainees and their visitors, and its practice of conducting random "shakedown" searches of cells while detainees were absent, did not violate Fourteenth Amendment. Block v. Rutherford, p. 576.

3. *Prison-cell searches—Destruction of prisoner's property.*—A state prison officer's allegedly intentional destruction of a prisoner's noncontraband personal property during a "shakedown" search of his cell did not violate due process since prisoner had adequate postdeprivation remedies under state law for any loss suffered. Hudson v. Palmer, p. 517.

4. *State prosecutions—Vindictiveness.*—Where respondent appealed his convictions in a Mississippi Justice of Peace Court of misdemeanor traffic offenses arising from a collision between his car and a truck that resulted in death of a truck passenger, and case was transferred to Circuit Court for a trial *de novo*, his prosecution and conviction for manslaughter based on same accident, while his appeal of misdemeanor convictions was pending, was unconstitutional as a violation of due process, presumption of unconstitutional vindictiveness that arose from obtaining indictment being appropriate here. Thigpen v. Roberts, p. 27.

**V. Freedom of Association.**

*Membership in organization—Sex discrimination.*—Application of a Minnesota statute prohibiting sex discrimination in places of public accommodation so as to compel appellee nonprofit national membership corporation to accept women as regular voting members did not abridge either male members' freedom of intimate association or their freedom of expressive association; state statute was not unconstitutionally vague or overbroad either on its face or as construed and applied. Roberts v. United States Jaycees, p. 609.

**VI. Freedom of Speech.**

1. *Demonstrations in public park—Sleeping in symbolic tent cities.*—Application of regulations of National Park Service—which had authorized respondent organization to conduct a demonstration in Lafayette Park and the Mall in Washington, D. C., to call attention to plight of homeless by

**CONSTITUTIONAL LAW**—Continued.

erecting symbolic tent cities—so as to prevent demonstrators from sleeping in tents did not violate First Amendment. Clark v. Community for Creative Non-Violence, p. 288.

2. *Illustrations of United States obligations—Validity of statutory restriction.*—"Purpose" requirement of 18 U. S. C. § 504, which permits printing, subject to size and color restrictions, illustrations of United States obligations or securities "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," unconstitutionally discriminates on the basis of content in violation of First Amendment. Regan v. Time, Inc., p. 641.

3. *Noncommercial television and radio stations—Prohibition of "editorializing."*—Section 399 of Public Broadcasting Act of 1967, which forbids noncommercial educational television and radio stations that receive federal grants to engage in "editorializing," violates First Amendment. FCC v. League of Women Voters of California, p. 364.

**VII. Privilege Against Self-Incrimination.**

1. *Draft registration—Prerequisite for student loan.*—Section 12(f) of Military Selective Service Act, which denies federal financial assistance under Title IV of Higher Education Act of 1965 to male students between certain ages who fail to register for draft, and which requires applicants for Title IV assistance to file a statement with their educational institution attesting to their compliance with Military Selective Service Act and implementing regulations, does not violate privilege against self-incrimination of students who did not register for draft. Selective Service System v. Minnesota Public Interest Research Group, p. 841.

2. *Miranda warnings—Arrest for misdemeanor—Custodial interrogation.*—Where (1) a state police officer stopped respondent's car after observing it weaving in and out of a traffic lane and asked him to get out of car, (2) after failing field sobriety test, respondent made incriminating statements when asked if he had been using intoxicants, and he was then formally arrested, (3) he again made incriminating statements when questioning was resumed at station house, and (4) at no time was he given *Miranda* warnings, his statements made after his formal arrest were inadmissible in his prosecution for misdemeanor of drunken driving since a person subjected to "custodial interrogation" is entitled to benefit of *Miranda* safeguards regardless of nature or severity of offense involved; but respondent's statements made before his formal arrest were admissible since his roadside questioning did not constitute "custodial interrogation." Berkemer v. McCarty, p. 420.

**VIII. Right to Jury Trial.**

*Capital offense—Determination of punishment by trial judge.*—Sixth Amendment does not guarantee a right to a jury determination of appropriate punishment upon finding defendant guilty of a capital offense, and

**CONSTITUTIONAL LAW**—Continued.

there is no constitutional requirement that a jury's recommendation of life imprisonment be final so as to preclude trial judge, pursuant to state statutory scheme, from overriding jury's recommendation and imposing death sentence; accordingly, there is no basis for a double jeopardy challenge to such a jury-override procedure. Spaziano v. Florida, p. 447.

**IX. Searches and Seizures.**

1. *Exclusionary rule—Good-faith exception.*—Fourth Amendment exclusionary rule should not be applied to bar prosecution's use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid; record established that officers' reliance on state-court judge's determination of probable cause in issuing a facially valid search warrant was objectively reasonable, and thus trial court in federal prosecution should not have applied exclusionary rule even though it concluded that affidavit on which warrant was based was insufficient to establish probable cause. United States v. Leon, p. 897.

2. *Exclusionary rule—Good-faith exception.*—Where (1) officer's affidavit to support an application for a search warrant in connection with a homicide investigation described items involved, (2) a warrant application form could not be located, so officer made changes on a form previously used with regard to a search for controlled substances, (3) a judge concluded that affidavit established probable cause and made some changes in application form, but did not change portion authorizing a search for controlled substances, (4) judge then signed warrant and told officer that it was sufficient to authorize search, and (5) ensuing search was limited to items listed in affidavit and resulted in seizure of incriminating evidence, federal exclusionary rule did not require exclusion of evidence at state-court murder prosecution. Massachusetts v. Sheppard, p. 981.

3. *House search—Monitoring beeper—Validity of search warrant.*—Where (1) after learning from informant that certain respondents had ordered ether for extracting cocaine from imported clothing, Government obtained a warrant authorizing installation of a beeper in one of cans of ether, which was then done with informant's consent, (2) by surveillance and by monitoring beeper, Government agents tracked movements of ether to certain houses, then to lockers in commercial storage facilities rented by certain respondents, and finally to a house rented by certain respondents, (3) officers obtained a warrant to search last house based in part on information derived through use of beeper, and cocaine was then seized, and (4) trial court suppressed seized evidence at respondents' trial on federal drug charges because initial warrant to install beeper was invalid, respondents' Fourth Amendment rights were not infringed by beeper's installation, which was validated by informant's consent; although use of a beeper, without a valid warrant, to obtain information that otherwise could not be obtained from outside a private residence violates Fourth Amend-

**CONSTITUTIONAL LAW**—Continued.

ment, evidence should not have been suppressed here since search warrant affidavit, after striking facts about monitoring beeper while it was in searched house, was sufficient to furnish probable cause for issuance of search warrant. United States v. Karo, p. 705.

4. *Prison-cell searches—Destruction of prisoner's property.*—A prisoner has no reasonable expectation of privacy in his prison cell entitling him to protection of Fourth Amendment against unreasonable searches, and a state prison officer's allegedly intentional destruction of a prisoner's noncontraband personal property during a "shakedown" cell search did not constitute an unreasonable "seizure" of such property. Hudson v. Palmer, p. 517.

5. *Unlawful arrest of alien—Effect in deportation proceedings.*—Respondent alien's contention that his allegedly unlawful arrest by an Immigration and Naturalization Service agent precluded his being summoned to his deportation proceeding was without merit since "body" or identity of a defendant in a criminal or civil proceeding is never itself suppressible as fruit of an unlawful arrest; Fourth Amendment exclusionary rule does not apply in a civil deportation proceeding, and thus second respondent alien's admission of illegal entry, made after his allegedly unlawful arrest by an INS agent, was not required to be excluded at his deportation hearing. INS v. Lopez-Mendoza, p. 1032.

6. *Warrant to search apartment—Effect of earlier security check.*—Where (1) agents, acting on information that petitioners probably were trafficking in cocaine from their apartment, maintained a surveillance and ultimately were authorized by an Assistant United States Attorney to arrest petitioners and were advised to secure premises until a search warrant could be obtained, (2) one petitioner was arrested in apartment building lobby and was taken to apartment, where other petitioner admitted agents, who conducted a security check of apartment, observed drug paraphernalia in plain view, and arrested other petitioner, (3) after a search warrant was issued, agents discovered and seized other pertinent evidence, and (4) petitioners were convicted of federal drug offenses, evidence seized during second search was properly admitted since there was an independent source for information on which warrant was based, wholly unconnected with initial entry whether it was illegal or not. Segura v. United States, p. 796.

**CONVICTION AS BARRING SUBSEQUENT PROSECUTION FOR LESSER INCLUDED OFFENSE.** See **Constitutional Law,** III, 2.

**COUNTERFEITING.** See **Constitutional Law,** VI, 2.

**CRIMINAL LAW.** See also **Constitutional Law,** III; IV; VI, 2; VII, 2; VIII; IX, 1–4, 6; **Habeas Corpus; Stays,** 4, 5.

1. *False statements—Matters within federal agency's jurisdiction—Knowledge.*—Under 18 U. S. C. § 1001, which provides that "[w]hoever,

**CRIMINAL LAW**—Continued.

in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements . . . shall be fined," proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction. United States v. Yermian, p. 63.

2. *First-degree murder prosecution—Instructions on lesser included offenses.*—In state-court trial resulting in petitioner's conviction of first-degree murder, trial judge did not err in refusing to instruct jury on lesser included offenses since petitioner refused to waive statute of limitations, which had expired as to those offenses. Spaziano v. Florida, p. 447.

3. *Second conviction after retrial—Greater sentence—Vindictiveness of judge.*—After retrial and second conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying either relevant *conduct* or relevant *events* that occurred subsequent to original sentencing proceedings; District Judge's explanation that he imposed a greater sentence after petitioner's retrial and second conviction following his successful appeal from his first conviction of a passport offense because of petitioner's intervening conviction of another unrelated federal offense rebutted any presumption of vindictiveness on judge's part that would violate due process. Wasman v. United States, p. 559.

**CUBA.** See **Trading with the Enemy Act.**

**CUSTODIAL INTERROGATION BY POLICE.** See **Constitutional Law, VII, 2.**

**DEATH PENALTY.** See **Constitutional Law, VIII.**

**DEMONSTRATIONS IN PUBLIC PARKS.** See **Constitutional Law, VI, 1.**

**DEPORTATION.** See **Constitutional Law, IX, 5.**

**DISCRIMINATION BASED ON RACE.** See **Constitutional Law, IV, 1; Standing to Sue.**

**DISCRIMINATION BASED ON SEX.** See **Constitutional Law, IV, 1; V.**

**DISCRIMINATION IN EMPLOYMENT.** See **Statutes of Limitations.**

**DOUBLE JEOPARDY.** See **Constitutional Law, III; VIII.**

**DRAFT REGISTRATION AS PREREQUISITE FOR STUDENT LOAN.** See **Constitutional Law, I; VII, 1.**

**DUE PROCESS.** See **Attorney's Fees; Civil Rights Act of 1871; Constitutional Law, IV; V; Criminal Law, 3; Habeas Corpus; Trading with the Enemy Act.**

**EDITORIALIZING BY TELEVISION AND RADIO STATIONS.** See **Constitutional Law, VI, 3.**

**EDUCATION OF THE HANDICAPPED ACT.** See also **Attorney's Fees.**

*"Related services"—Catheterization of handicapped child.*—For purposes of Act's provisions that require a school district receiving federal funding to provide a handicapped child with a free appropriate public education, including "related services," a procedure of catheterization that was prescribed to be performed every few hours on respondents' daughter, and that could be performed in a few minutes by a layperson with less than an hour's training, was a "related service" that petitioner School District was required to provide; however, since relief was available to respondents under Act, they were not entitled to any relief, including recovery of attorney's fees, under § 504 of Rehabilitation Act of 1973. Irving Independent School Dist. v. Tatro, p. 883.

**EIGHTH AMENDMENT.** See **Constitutional Law, VIII.**

**ELECTIONS.** See **Stays, 3.**

**EMBARGOES ON FOREIGN COUNTRIES.** See **Trading with the Enemy Act.**

**EMPLOYER AND EMPLOYEES.** See **Civil Rights Act of 1871; Statutes of Limitations.**

**EMPLOYMENT DISCRIMINATION.** See **Statutes of Limitations.**

**EQUAL PROTECTION OF THE LAWS.** See **Attorney's Fees.**

**EVIDENCE.** See **Constitutional Law, IX, 1, 2, 5.**

**EXCISE TAXES ON WHOLESALE LIQUOR SALES.** See **Constitutional Law, II.**

**EXCLUSIONARY RULE.** See **Constitutional Law, IX, 1, 2, 5.**

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**FEDERAL RESERVE BOARD'S APPROVAL OF BANK HOLDING COMPANIES' ACQUISITIONS.** See **Bank Holding Company Act of 1956.**

**FEDERAL-STATE RELATIONS.** See **Attorney's Fees; Constitutional Law, II; Education of the Handicapped Act; National Labor Relations Act.**

**FIFTH AMENDMENT.** See **Constitutional Law, III; IV, 1; VII; VIII.**

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**FOREMEN OF GRAND JURY.** See **Constitutional Law, IV, 1.**

**FOURTEENTH AMENDMENT.** See **Attorney's Fees; Civil Rights Act of 1871; Constitutional Law, IV, 2–4; V.**

**FOURTH AMENDMENT.** See **Constitutional Law, IX.**

**FREEDOM OF ASSOCIATION.** See **Constitutional Law, V.**

**FREEDOM OF SPEECH.** See **Constitutional Law, V; VI.**

**FREEDOM TO TRAVEL.** See **Trading with the Enemy Act.**

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**GOOD-FAITH EXCEPTION TO EXCLUSIONARY RULE.** See **Constitutional Law, IX, 1, 2.**

**GOVERNMENT EMPLOYEES.** See **Civil Rights Act of 1871.**

**GOVERNMENT OFFICIALS' IMMUNITY FROM LIABILITY.** See **Civil Rights Act of 1871.**

**GRAND JURY FOREMEN.** See **Constitutional Law, IV, 1.**

**HABEAS CORPUS.** See also **Stays, 4.**

*Federal relief—State prisoner's failure to raise issue on appeal.*—Where (1) respondent was convicted of first-degree murder in a 1969 state-court trial in which jury was instructed that respondent had burden of proving lack of malice, and respondent did not challenge constitutionality of instruction on appeal, and (2) in 1975, *Mullaney* v. *Wilbur*, 421 U. S. 684, held that such burden of proof violated due process, respondent had "cause" for failing to raise then-novel *Mullaney* issue on appeal from his conviction and thus was not barred from seeking federal habeas corpus relief after *Hankerson* v. *North Carolina*, 432 U. S. 233, held in 1977 that *Mullaney* was to have retroactive application. Reed v. Ross, p. 1.

**HANDICAPPED CHILDREN.** See **Attorney's Fees; Education of the Handicapped Act.**

**HAWAII.** See **Constitutional Law, II.**

**HIGHER EDUCATION ACT OF 1965.** See **Constitutional Law, I; VII, 1.**

**HOUSE SEARCHES.** See **Constitutional Law, IX, 3.**

**HUNG JURIES.** See **Constitutional Law, III, 1.**

**ILLUSTRATIONS OF UNITED STATES OBLIGATIONS OR SECURITIES.** See **Constitutional Law, VI, 2.**

**IMMUNITY OF GOVERNMENT OFFICIALS FROM LIABILITY.** See **Civil Rights Act of 1871.**

**INDIANS.** See **Stays, 7.**

**INITIATIVE FOR CONSTITUTIONAL CONVENTION.** See **Stays, 6.**

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**JURORS' INABILITY TO AGREE AS AFFECTING RETRIAL.** See **Constitutional Law, III, 1.**

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**LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.** See **National Labor Relations Act.**

**LABOR UNION OFFICERS.** See **National Labor Relations Act.**

**LESSER INCLUDED OFFENSES.** See **Constitutional Law, III, 2; Criminal Law, 2.**

**LIMITATION OF ACTIONS.** See **Criminal Law, 2; Statutes of Limitations.**

**LIQUOR TAXES.** See **Constitutional Law, II.**

**LOANS TO STUDENTS.** See **Constitutional Law, I; VII, 1.**

**MALICE.** See **Habeas Corpus.**

**MARYLAND.** See **Statutes of Limitations.**

**MILITARY SELECTIVE SERVICE ACT.** See **Constitutional Law, I; VII, 1.**

**MINNESOTA.** See **Constitutional Law, V.**

**MIRANDA WARNINGS.** See **Constitutional Law, VII, 2.**

**NATIONAL LABOR RELATIONS ACT.**

*Casino industry union officers—Qualifications—Pre-emption of state law.*—Section 7 of Act did not pre-empt New Jersey statute insofar as it disqualified persons who had been convicted of certain offenses or who

**NATIONAL LABOR RELATIONS ACT**—Continued.

associated with other criminal offenders from serving as casino industry union officers; because of procedural posture of case, Court would not consider issues as to pre-emption of state statute's sanctions to effect removal of disqualified union officials. Brown v. Hotel Employees, p. 491.

**NATIONAL PARKS.** See **Constitutional Law, VI, 1.**

**NEW JERSEY.** See **National Labor Relations Act.**

**PHOTOGRAPHS OF UNITED STATES OBLIGATIONS OR SECURITIES.** See **Constitutional Law, VI, 2.**

**POLICE INTERROGATION.** See **Constitutional Law, VII, 2.**

**PRE-EMPTION OF STATE LAW BY FEDERAL LAW.** See **National Labor Relations Act.**

**PRETRIAL DETAINEES' VISITATION RIGHTS.** See **Constitutional Law, IV, 2.**

**PRIMARY ELECTIONS.** See **Stays, 3.**

**PRISON-CELL SEARCHES.** See **Constitutional Law, IV, 2, 3; IX, 4.**

**PRIVATE SCHOOLS' TAX-EXEMPT STATUS.** See **Standing to Sue.**

**PRIVILEGE AGAINST SELF-INCRIMINATION.** See **Constitutional Law, VII.**

**PUBLIC BROADCASTING ACT OF 1967.** See **Constitutional Law, VI, 3.**

**PUBLIC EMPLOYEES.** See **Civil Rights Act of 1871.**

**PUBLIC OFFICIALS' IMMUNITY FROM LIABILITY.** See **Civil Rights Act of 1871.**

**PUBLIC PARKS.** See **Constitutional Law, VI, 1.**

**RACIAL DISCRIMINATION.** See **Constitutional Law, IV, 1; Standing to Sue.**

**RADIO STATIONS' RIGHT TO EDITORIALIZE.** See **Constitutional Law, VI, 3.**

**REGISTRATION FOR DRAFT AS PREREQUISITE FOR STUDENT LOAN.** See **Constitutional Law, I; VII, 1.**

**REHABILITATION ACT OF 1973.** See **Attorney's Fees; Education of the Handicapped Act.**

**RETRIAL AFTER JURORS' INABILITY TO AGREE.** See **Constitutional Law, III, 1.**

**RETROACTIVITY OF DECISIONS.** See **Habeas Corpus.**

**RIGHT TO JURY TRIAL.** See **Constitutional Law,** VIII.

**RIGHT TO TRAVEL.** See **Trading with the Enemy Act.**

**SCHOOL DISTRICT'S LIABILITY FOR INJURY TO SCHOOLCHILD.** See **Stays,** 7.

**SEARCHES AND SEIZURES.** See **Constitutional Law,** IV, 2, 3,; IX.

**SECURITIES REGULATION.** See **Bank Holding Company Act of 1956; Banking Act of 1933.**

**SEGREGATED PRIVATE SCHOOLS' TAX-EXEMPT STATUS.** See **Standing to Sue.**

**SELF-INCRIMINATION.** See **Constitutional Law,** VII.

**SENTENCING ON SECOND CONVICTION AFTER RETRIAL.** See **Criminal Law,** 3.

**SEPARATION OF POWERS.** See **Standing to Sue.**

**SEX DISCRIMINATION.** See **Constitutional Law,** IV, 1; V.

**"SHAKEDOWN" SEARCHES OF PRISON CELLS.** See **Constitutional Law,** IV, 2, 3; IX, 4.

**SHERMAN ACT.** See **Antitrust Acts.**

**SIGNATURES ON CANDIDATE'S DESIGNATING PETITION.** See **Stays,** 3.

**SIXTH AMENDMENT.** See **Constitutional Law,** VIII.

**SLEEPING IN SYMBOLIC TENT CITIES.** See **Constitutional Law,** VI, 1.

**SOCIAL SECURITY ACT.** See **Stays,** 1.

**SPECIAL EDUCATION PROGRAMS.** See **Attorney's Fees; Education of the Handicapped Act.**

**STANDING TO SUE.** See also **Constitutional Law,** II.

*Segregated private schools—Tax-exempt status—Suit against Government officials.*—Respondents, parents of black children attending public schools in school districts undergoing desegregation, did not have standing to bring a nationwide class action against Government officials, alleging that Internal Revenue Service had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools, and that unlawful tax exemptions had been granted to racially segregated private schools. Allen v. Wright, p. 737.

**STATE EXCISE TAXES ON WHOLESALE LIQUOR SALES.** See **Constitutional Law,** II.

**STATE INITIATIVE FOR CONSTITUTIONAL CONVENTION.** See **Stays, 6.**

**STATUTES OF LIMITATIONS.** See also **Criminal Law,** 2.

*Federal Civil Rights Acts—Employment discrimination—Borrowing state limitations period.*—In an action by respondent employees of a Maryland state college for alleged employment discrimination in violation of certain federal Civil Rights Acts that do not contain a statute of limitations, Federal District Court properly turned to state law but erred in borrowing 6-month limitations period from Maryland's administrative employment discrimination statute. Burnett v. Grattan, p. 42.

**STAYS.**

1. *Aid to Families with Dependent Children statute.*—Application to stay, pending review by this Court, enforcement of District Court's permanent injunction—which requires state and local officials, in determining eligibility and benefits under Aid to Families with Dependent Children statute, to deduct statutory standard work expense disregard after deducting such items as federal, state, and local taxes—is granted prospectively from effective date of statute's amendment, which occurred after grant of certiorari. Heckler v. Turner (REHNQUIST, J., in chambers), p. 1305.

2. *Attorney's fees—Veterans' claims.*—Application to stay District Court's injunction prohibiting enforcement of 38 U. S. C. §§ 3404 and 3405—which forbid payment of a fee of more than $10 by a veteran to an agent or attorney in connection with a claim for monetary benefits under laws administered by Veterans Administration—is granted pending filing and disposition of a jurisdictional statement. Walters v. National Assn. of Radiation Survivors (REHNQUIST, J., in chambers), p. 1323.

3. *Primary election ballots.*—Application to stay enforcement of Federal District Court orders directing that New York City Board of Elections accept respondents' designating petitions and place their names on ballot for imminent party primary election, is denied. Montgomery v. Jefferson (MARSHALL, J., in chambers), p. 1313.

4. *Retrial of state prisoner.*—Application to stay District Court's order (as directed by Court of Appeals in habeas corpus proceedings) for retrial of respondent state prisoner prior to start of this Court's October 1984 Term is granted pending disposition of petition for certiorari to review Court of Appeals' judgment. Garrison v. Hudson (BURGER, C. J., in chambers), p. 1301.

5. *Selection of trial jury.*—California's application to stay, pending disposition of its petition for certiorari, California Supreme Court's judgment reversing respondent's murder conviction and holding that trial jury, which was empaneled by use of a voter registration list, was not drawn

**STAYS**—Continued.

from a fair cross section of community, is denied. California v. Harris (REHNQUIST, J., in chambers), p. 1303.

6. *State initiative for Constitutional Convention.*—Application to stay California Supreme Court's mandate prohibiting placement on ballot of an initiative that would require California Legislature or California Secretary of State to request Congress to call a Constitutional Convention to amend Federal Constitution so as to require a balanced federal budget, is denied. Uhler v. AFL–CIO (REHNQUIST, J., in chambers), p. 1310.

7. *Tribal-court jurisdiction.*—On application to stay Court of Appeals' mandate, which reversed District Court's judgment enjoining respondent Crow Tribe from executing on Crow Tribal Court's default judgment against School District—District Court having held that Tribal Court lacked subject-matter jurisdiction of an action brought against School District by respondent schoolchild (a Crow Indian) for personal injuries sustained on School District's land located within Crow Indian Reservation—a temporary stay that was granted earlier by Circuit Justice is continued pending disposition of a petition for certiorari; this Court's Rule governing supersedeas bonds is not applicable since federal-court proceedings did not seek direct review of Tribal Court judgment. National Farmers Union Ins. Cos. v. Crow Tribe (REHNQUIST, J., in chambers), p. 1315.

**STUDENT LOANS.** See **Constitutional Law,** I; VII, 1.

**SUPERSEDEAS BONDS.** See **Stays,** 7.

**SUPREMACY CLAUSE.** See **National Labor Relations Act.**

**SUPREME COURT.** See also **Stays,** 7.

1. Amendments to Rules of the Supreme Court, p. 1253.

2. Term statistics, p. 1325.

**TAXES.** See **Constitutional Law,** II; **Standing to Sue.**

**TAX-EXEMPT STATUS OF SEGREGATED PRIVATE SCHOOLS.** See **Standing to Sue.**

**TELEVISING COLLEGE FOOTBALL GAMES.** See **Antitrust Acts.**

**TELEVISION STATIONS' RIGHT TO EDITORIALIZE.** See **Constitutional Law,** VI, 3.

**TENT CITIES.** See **Constitutional Law,** VI, 1.

**TRADING WITH THE ENEMY ACT.**

*Restrictions on travel to Cuba—Right to travel.*—Grandfathered authorities of § 5(b) of Act provided an adequate statutory basis for 1982 amendment of a Treasury Department Regulation so as to prohibit general

**TRADING WITH THE ENEMY ACT**—Continued.

tourist and business travel to Cuba, and such restrictions on travel-related transactions with Cuba do not violate freedom to travel protected by Due Process Clause of Fifth Amendment. Regan v. Wald, p. 222.

**TRAFFIC OFFENSES.** See **Constitutional Law,** VII, 2.

**TRAVEL RIGHTS.** See **Trading with the Enemy Act.**

**TRIBAL-COURT JURISDICTION.** See **Stays,** 7.

**TWENTY-FIRST AMENDMENT.** See **Constitutional Law,** II.

**UNION OFFICERS.** See **National Labor Relations Act.**

**UNITED STATES OBLIGATIONS OR SECURITIES.** See **Constitutional Law,** VI, 2.

**UNIVERSITY FOOTBALL GAME TELECASTS.** See **Antitrust Acts.**

**VAGUENESS OF STATUTES.** See **Constitutional Law,** V.

**VETERANS' CLAIMS FOR MONETARY BENEFITS.** See **Stays,** 2.

**VINDICTIVENESS OF JUDGE OR PROSECUTOR.** See **Constitutional Law,** IV, 4; **Criminal Law,** 3.

**VIRGINIA.** See **Constitutional Law,** IV, 3.

**VISITATION RIGHTS OF PRETRIAL DETAINEES.** See **Constitutional Law,** IV, 2.

**VOTER REGISTRATION LISTS AS BASIS FOR JURY SELECTION.** See **Stays,** 5.

**WAIVER OF STATUTE OF LIMITATIONS.** See **Criminal Law,** 2.

**WARRANT TO SEARCH HOUSE OR APARTMENT.** See **Constitutional Law,** IX, 3, 6.

**WELFARE BENEFITS.** See **Stays,** 1.

**WORDS AND PHRASES.**

1. *"Closely related to banking."* § 4(c)(8), Bank Holding Company Act of 1956, 12 U. S. C. § 1843(c)(8). Securities Industry Assn. v. Board of Governors, FRS, p. 207.

2. *"Knowingly and willfully."* 18 U. S. C. § 1001. United States v. Yermian, p. 63.

3. *"Public sale."* § 20, Glass-Steagall Act, 12 U. S. C. § 377. Securities Industry Assn. v. Board of Governors, FRS, p. 207.

4. *"Related services."* Education of the Handicapped Act, 20 U. S. C. § 1401(18). Irving Independent School Dist. v. Tatro, p. 883.

5. *"Securities."* §§ 16, 21, Banking Act of 1933, 12 U. S. C. §§ 24 Seventh, 378(a)(1). Securities Industry Assn. v. Board of Governors, FRS, p. 137.